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United States
1 1286
Circuit Court of Appeals
For the Ninth Circuit.

HERTA MARLOW,

Appellant,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
Appellee.

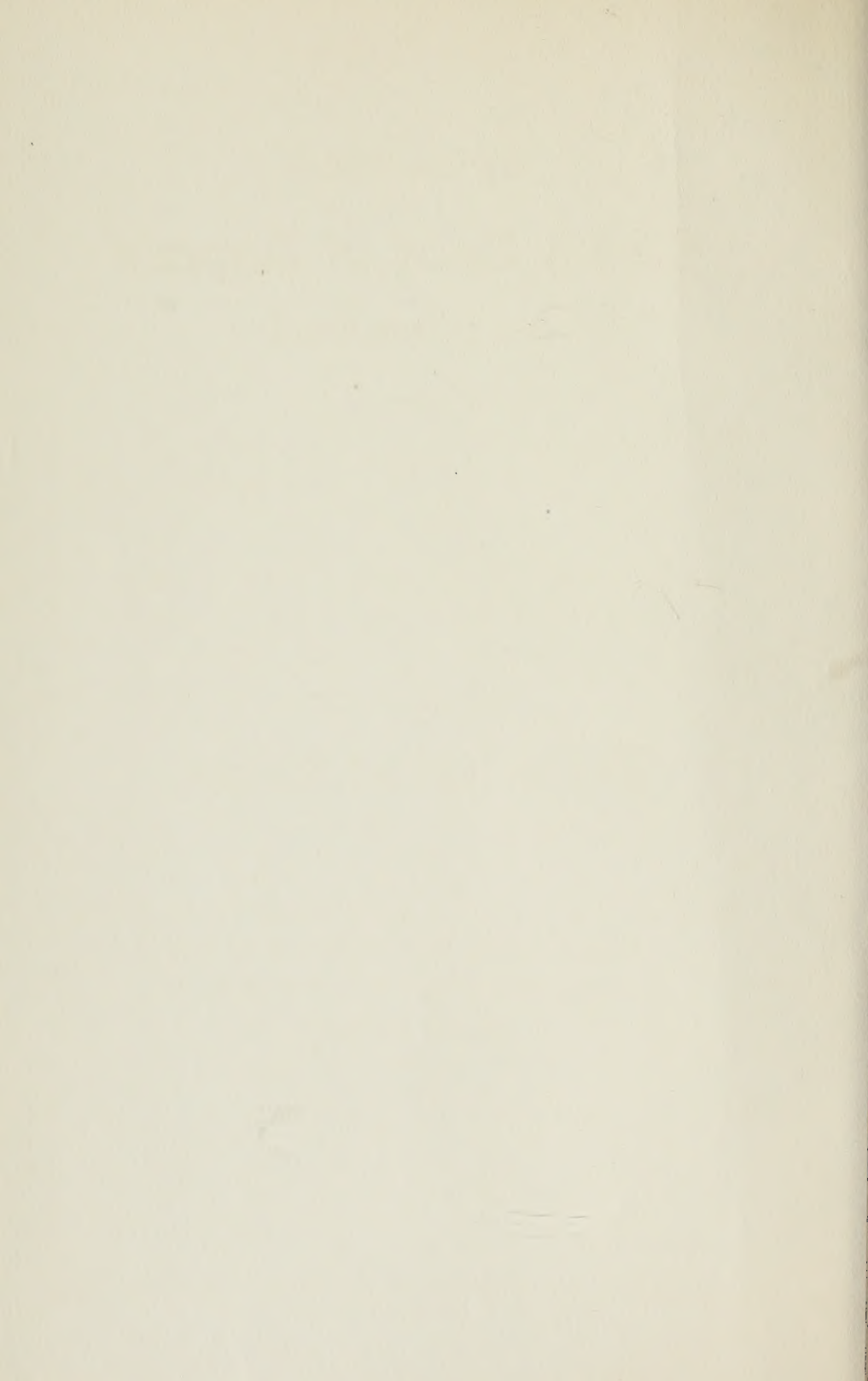
Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

FILED

JAN 14 1921

F. D. MONCKTON,
CLERK.



United States
Circuit Court of Appeals
For the Ninth Circuit.

HERTA MARLOW,


Appellant,

vs.

CHARLES PAGANINI, as Administrator of the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

ERNEST K. LITTLE, Esq., Attorney for Herta
Marlow, Appellant.

Foxcroft Building, San Francisco, Cal.

WALTON C. WEBB, Esq., Attorney for Charles
Paganini, as Admr., Appellee,

Claus Spreckels Building, San Francisco,
California.

In the Southern Division of the United States
District Court, for the Northern District of
California, Second Division.

No. 512.—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Decree.

IT APPEARING TO THE COURT that plaintiff, New York Life Insurance Company, a corporation, has heretofore filed its bill of interpleader herein, offering to pay into court the sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars, and praying for a decree that the defendants herein be required to interplead and litigate their respective claims to the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65)

Dollars, and that said plaintiff be released from all claims or demands against it by the said defendants, or any or either of them, on account of any of the matters or things contained in the said bill of interpleader;

AND IT FURTHER APPEARING that the said plaintiff has paid into this court the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars; [1*]

AND IT FURTHER APPEARING that said plaintiff is entitled to be repaid for its costs herein expended in the sum of Seventeen and 45/100 (17.45) Dollars, and that it is entitled to compensation for the services of its solicitors herein in the sum of Two Hundred Fifty (250) Dollars; and that the parties to the above-entitled action have stipulated by their respective counsel that the said plaintiff be released and discharged from all obligation and liability on account of any of the matters or things set out in plaintiff's bill of interpleader herein;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that said plaintiff, New York Life Insurance Company, a corporation, be released from all liability to the defendants, or any or either of them, on account of any of the matters or things referred to in plaintiff's bill of interpleader herein, and particularly on account of all claims arising out of or on account of that certain policy of insurance, or the proceeds thereof, which said policy was issued by plaintiff, New York Life Insurance Company,

*Page-number appearing at foot of page of original certified Transcript of Record.

a corporation, upon the life of one David K. Marlow in the sum of Five Thousand (5,000) Dollars, said policy of insurance being numbered six million one hundred forty-seven thousand eight hundred forty-three (6,147,843), and dated May 29, 1917.

IT IS FURTHER ORDERED that the said defendants, and each of them, their agents, servants and attorneys, be and they are each and all of them hereby forever enjoined and restrained from making any claim against said New York Life Insurance Company, a corporation, on account of the said insurance policy, and particularly [2] from commencing or proceeding with any action or actions or suit or suits against the said company in any court or courts on account of the said policy of insurance, or the proceeds thereof, or any manner or thing in relation thereto.

IT IS FURTHER ORDERED, that the clerk of this court forthwith pay to the said plaintiff out of the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars, deposited as aforesaid, the sum of Two Hundred Sixty-seven and 45/100 (267.45) Dollars, allowed as solicitor's fees and costs; and

IT IS FURTHER ORDERED, that this action be continued as between the defendants Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and Herta Marlow, to determine the ownership of the said sum of Four Thousand Nine Hundred Ten and 65/100 (4,910.65) Dollars, less the sum of Two Hundred Sixty-seven and 45/100 (267.45) Dollars, paid as above directed as solicitors' fees and costs; and for that purpose the de-

fendant Herta Marlow may within forty days from the date hereof, file with the clerk of this court a written statement on oath of the matters and things herein in controversy, and of the facts and circumstances upon which her claim is founded; which said statement may within twenty days thereafter be answered by the defendant Charles Paganini, as administrator of the estate of David K. Marlow, deceased.

Dated this 6th day of July, 1920.

WM. H. HUNT,

Judge of the said Court. [3]

WE HEREBY STIPULATE to the entry of the foregoing decree, and agree that the sum of Two Hundred Sixty-seven and 45/100 (267.45) Dollars shall be paid to plaintiff, New York Life Insurance Company, a corporation, as solicitors' fees and costs, and that the said plaintiff, New York Life Insurance Company, a corporation, be released and discharged from all claims on account of any of the matters or things mentioned in its bill of interpleader herein.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitors for Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased.

ERNEST K. LITTLE,

Solicitors for Defendant Herta Marlow.

J. M. MANNON,

McCUTCHEN, WILLARD, MANNON &
GREENE,

Solicitors for Plaintiff.

[Endorsed]: Filed and entered July 6, 1920.
Walter B. Maling, Clerk. [4]

In the Southern Division of the United States
District Court, for the Northern District of
California, Second Division.

No. 512.—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

**Written Statement of Herta Marlow of the Facts and
Circumstances Upon Which Her Claim is
Founded.**

Now comes the defendant Herta Marlow and pursuant to the order and decree of this Court given and entered on the 6th day of July, 1920, makes and files her written statement on oath of the matters and things in controversy, and of the facts and circumstances upon which her claim is founded, as follows:

I.

That plaintiff is and at and during all of the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the

State of New York, engaged in the business of making contracts of insurance on the lives of individuals and transacting other business incident to or usually connected with a general life insurance business, having its home office and principal place of business in the City of New York, State of New York.

II.

That on May 29, 1917, plaintiff entered into a contract [5] with the said David K. Marlow, evidenced by its written policy of insurance number six million one hundred forty-seven thousand eight hundred forty-three (6,147,843); that a true and correct copy of said policy of insurance is attached to plaintiff's bill of interpleader herein, marked Exhibit "A," and is hereby referred to and made a part hereof. That in and by said insurance policy plaintiff undertook to and did insure the life of said David K. Marlow for the sum of Five Thousand (5,000) Dollars, payable to his executors, administrators or assigns, or to the duly designated beneficiary, upon receipt of due proof of the death of the said David K. Marlow.

III.

That said policy expressly provided that the insured, David K. Marlow, had the right to change the beneficiary thereof, said provision being in the words and figures following:

"CHANGE OF BENEFICIARY.—The Insured may at any time, and from time to time, change the beneficiary, provided this policy is not then assigned. Every change of beneficiary

must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured is living at the time of such indorsement or not. In the event of the death of any beneficiary before the Insured, the interest of such beneficiary shall vest in the Insured."

IV.

That the provision of said policy in relation to assignment thereof was as follows:

"ASSIGNMENT.—Any assignment of this policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment."

V.

That on the 18th day of March, 1918, the said David K. Marlow filed at the San Francisco Branch Office of the plaintiff a direction in due form to change the beneficiary of said policy [6] to Miss Jennie Heppner, which said change of beneficiary was thereafter forwarded to the Home Office of the plaintiff at the city of New York, in the State of New York, and was never canceled, recalled or annulled by said David K. Marlow.

VI.

That said David K. Marlow never made any assign-

ment of said policy in duplicate, or in writing or at all, except that prior to the 18th day of March, 1918, said David K. Marlow deposited said policy with one Ben Janowitz as security for the payment to said Ben Janowitz of certain moneys due or to become due under a certain contract dated November 15th, 1917, and certain promissory note accompanying said contract.

VII.

That on the 30th day of May, 1919, David K. Marlow died at the city and county of San Francisco, State of California, and thereafter satisfactory proofs of death were furnished to and accepted as sufficient by said plaintiff.

VIII.

That on said date, May 30th, 1919, said policy of life insurance was still in possession of said Ben Janowitz and was held by him as security for the sum of \$491.12, with interest thereon from November 15th, 1917, which said sum was then due and owing from said David K. Marlow to said Ben Janowitz.

IX.

That on or about the 1st day of October, 1919, Miss Jennie Heppner assigned, sold, transferred and set over unto this defendant, Herta Marlow, all her right, title and interest in and to said policy of life insurance or the proceeds thereof, by virtue of said designation of said Miss Jennie Heppner as beneficiary or otherwise; and ever since said date the said Herta Marlow has been and now is the owner and holder thereof. [7]

X.

That on the 20th day of October, 1919, this defendant, Herta Marlow, for a valuable consideration, purchased from Ben Janowitz all of his said claim against David K. Marlow, deceased, amounting to the sum of \$491.12 and interest as aforesaid, whereupon and as a part of the consideration for such purchase the said Ben Janowitz delivered to said Herta Marlow the policy of life insurance aforesaid, so held by said Ben Janowitz as collateral security for the payment of said sums.

XI.

That a true and correct copy of said assignment from Ben Janowitz, dated October 20th, 1919, is hereto attached and marked Exhibit "A" and is hereby referred to and made a part hereof.

XII.

That no part of said sums referred to in said assignment amounting to the sum of \$491.12, exclusive of interest, has ever been paid and the whole thereof is now and at all times since the 20th day of October, 1919, has been due and owing to said Herta Marlow, who is still the owner thereof by virtue of said assignment.

XIII.

That during the month of November, 1919, while said designation of beneficiary dated March 18, 1918, referred to in paragraph V hereof, was at the home office of plaintiff in the city of New York, said Herta Marlow presented said policy to plaintiff at its said home office and demanded that said change of beneficiary be endorsed thereon and that the

amount due under said policy be paid to her, as the assignee of Miss Jennie Heppner or as the assignee of Ben Janowitz or as the assignee of both Miss Jennie Heppner and Ben Janowitz. [8]

XIV.

That this defendant, Herta Marlow, claims that under the provisions of section 2764 of the Civil Code of the State of California, the insured, David K. Marlow, had an absolute right to transfer said policy and the proceeds thereof to Miss Jennie Heppner, subject only to such prior rights, if any, which may have been acquired by Ben Janowitz, as pledgee; and that upon the death of said David K. Marlow the proceeds of said policy were payable to Miss Jennie Heppner, subject only to the possible claim of Ben Janowitz, under section 3008 of the Civil Code of the State of California, to have said proceeds first paid to him as pledgee of said policy. And this defendant, Herta Marlow, claims that, the conflicting rights and claims of Miss Jennie Heppner and of Ben Janowitz, having both been assigned to her, and the title to all of said conflicting rights and claims being now merged in her, the said Herta Marlow, no other person or persons have any right, title of interest in or claim to the proceeds of said policy whatsoever.

ERNEST K. LITTLE,

Solicitor for Defendant Herta Marlow. [9]

**Excerpts from Policy of Insurance No. 6,147,843 of
New York Life Ins. Co., Attached to Original
Complaint.**

Chartered 1841.

NEW YORK LIFE INSURANCE COMPANY.

AGREES TO PAY

Beneficiary to the Executors, Administrators or As-
signs of the insured, or to the duly desig-
nated * * *

Beneficiary

(with the right on the part of the Insured to change the
Beneficiary in the manner provided in Section 6)

Face
Amount

FIVE THOUSAND Dollars

(the face of this Policy)

upon receipt of due proof of the death of

Insured

DAVID K. MARLOW the Insured.

Section 6—Other Benefits and Provisions.

Assignment.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary.—The Insured may at any time, and from time to time, change the beneficiary, provided this Policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such in-

dorsement or not. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured.

Miscellaneous Provisions.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract.

6. I designate as Beneficiary to receive the proceeds of policy in event of death, and reserve the right to change the Beneficiary from time to time,—Beneficiary (Give name in full) Estate.

I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application; 2. That any payment made by me before delivery of the policy to, and its receipt by, me as aforesaid shall be binding on the Company only in accordance with the terms of the Company's receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made and is the only receipt the agent is authorized to give for such payment; 3. That only the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts or waive any of the Company's rights or requirements, and that none of these acts can be done by the agent taking this application.

DAVID KLIENERT MARLOW,

Exhibit "A."

KNOW ALL MEN BY THESE PRESENTS: That I, BEN JANOWITZ, for a valuable consideration to me paid do hereby sell, assign, transfer and set over unto HERTA MARLOW, her heirs and assigns all my right, title and interest in and to the certain instrument, bearing date, November 15th, 1917, and made between David K. Marlow and Graphic Printing Co., as first parties and the undersigned as second party together with all moneys due thereunder. And I do, simultaneously with the execution and delivery of this instrument deliver to said Herta Marlow

(a) Four promissory notes of the sum of \$15.00 each, dated November 15th, 1917;

Eight promissory notes of the sum of \$17.50 each, dated November 15th, 1917;

Four promissory notes of the sum of \$20.00 each, dated November 15th, 1917;

One promissory note of the sum of \$30.00 dated November 15th, 1917;

(b) The certain Policy of Insurance issued by New York Life Insurance Co., on the life of David K. Marlow and numbered 6,147,843.

which said notes and policy of life insurance are referred to in said instrument above described.

And I do hereby warrant and represent that under said instrument none of said notes has been paid; and that there is due to me under said agreement exclusive of said notes and interest the sum of \$79.12 paid to Remedial Loan Association and the

sum of \$92.00 and interest paid to Gemillath Chasodim Society.

Dated, San Francisco, Cal., October 20th, 1919.

BEN JANOWITZ. [10]

United States of America,
Southern District of New York,—ss.

Herta Marlow, being duly sworn, deposes and says:

That she is one of the defendants named in the above-entitled action; that she has read the foregoing written statement of Herta Marlow of the facts and circumstances upon which her claim is founded, and knows the contents thereof; that the same is true except as to those matters therein stated upon her information and belief and as to such statements she believes the same to be true.

HERTA MARLOW.

Subscribed and sworn to before me this 27th day of July, 1920.

[Seal]

OTTO A. SAMUELS,
Notary Public, New York County.

Term expires March 30, 1921.

Received a copy of the within verified statement of Herta Marlow this 2d day of August, 1920.

C. F. REINDOLLAR,
WALTON C. WEBB,
Attorneys for Charles Paganini, as Administrator, etc.

[Endorsed]: Filed Aug. 3, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

(Title of Court and Cause.)

Answer of Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased, to Written Statement of Herta Marlow.

Comes now the defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and answers the written statement of the defendant, Herta Marlow, on file in this action, and for such answer admits, denies and alleges, as follows:

I.

Defendant admits the allegations of paragraphs I, II, III and IV and VII of said statement.

II.

Defendant alleges that he is without knowledge, information or belief as to the allegations of paragraphs V, VI, VIII, X, XI, XII and XIII, or any thereof, of said statement, and, placing his denial upon such ground, denies all the allegations of said paragraphs.

III.

Defendant denies that the defendant, Herta Marlow, is now, or was on the first day of October, 1919, or at any time prior or subsequent thereto, the owner or holder of the policy of life insurance mentioned in said statement or the proceeds thereof. As to the other allegations of paragraph IX of said statement defendant alleges that he is without knowledge, information or belief, and, placing his denial upon such ground, denies the same.

IV.

Defendant denies that under the provisions of section 2764 of the Civil Code of the State of California, David K. Marlow had an absolute or any right to transfer said policy or the proceeds thereof to Jennie Heppner subject to any prior rights or otherwise, and denies that upon the death of said David K. [12] Marlow the proceeds of said policy or any thereof were payable to Jennie Heppner subject to any claim or otherwise. Defendant denies that defendant Herta Marlow has any right, title or interest in or claim to said policy or any of the proceeds thereof, and denies that the defendant has no right, title or interest in or claim to said policy or the proceeds thereof.

And as and for a further and separate answer this defendant alleges that said David K. Marlow died intestate on May 30, 1919, in, and was at the time of his death a resident of, the City and County of San Francisco, State of California, and that this defendant was by an order of the Superior Court of the City and County, of, San Francisco, State of California, duly given and made on the 26th day of February, 1920, appointed the administrator of the estate of said David K. Marlow, deceased, that this defendant thereupon duly qualified as such administrator and that letters of administration upon the estate of said deceased were duly issued to him on said 26th day of February, 1920, and that he ever since then has been and is now the duly appointed, qualified and acting administrator of the estate of said deceased. That

the policy of life insurance mentioned in said statement of the defendant, Herta Marlow, is payable to this defendant; that no beneficiary of said policy other than this defendant has ever been designated; that no assignment has been made of said policy, and that this defendant is entitled to the proceeds of said policy.

And as and for a further and separate answer this defendant alleges that he is informed and believes and upon such information and belief alleges that on the 18th day of March, 1918, and prior thereto and for some time thereafter said policy of life insurance was in the possession of Ben Janowitz, the same having been deposited with him by said David K. Marlow prior to March 18, 1918, as security for certain moneys owing from him to said Ben Janowitz, the amount of which is unknown to [13] this defendant, but is not as much as five hundred dollars (\$500).

WHEREFORE, this defendant prays that the Court decree that he is entitled to the proceeds of said policy and order that the same on deposit in this court be paid to this defendant, and for such other or further relief as is meet and proper in the premises.

C. F. REINDOLLAR,
WALTON C. WEBB,
Solicitors for said Defendant.

United States of America,
City and County of San Francisco,
State of California,—ss.

Charles Paganini, being first duly sworn, deposes

and says: That he is the administrator of the estate of David K. Marlow, deceased, one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein alleged upon his information and belief and as to such matters that he believes it to be true.

CHARLES PAGANINI.

Subscribed and sworn to before me this 19th day of August, 1920.

[Seal]

E. J. CASEY,

Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the within answer this 19th day of August, 1920.

ERNEST K. LITTLE,

Solicitor for Defendant Marlow.

Filed Aug. 20, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

(Order Designating Judge Rudkin to Sit in United States District Court for the Northern District of California.)

WHEREAS, in my judgment, the public interest so requires, I hereby designate and appoint the Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, to hold the District Court of the United States for the Northern District of California, dur-

ing the months of November and December, 1920, and to have and exercise within said district the same powers that are vested in the Judges thereof.

WITNESS my hand hereto this 11th day of October, 1920.

WM. B. GILBERT,
Senior Circuit Judge of the Ninth Circuit.

[Endorsed]: Filed Nov. 8, 1920. Walter B. Mal-
ing, Clerk. [15]

In the Southern Division of the United States Dis-
trict Court, for the Northern District of Cali-
fornia, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

McCUTCHEN, WILLARD, MANNON &
GREENE, Solicitors for Plaintiff.

C. F. REINDOLLAR, Esq., and WALTON C.
WEBB, Esq., Solicitors for Defendant Charles
Paganini, etc.

ERNEST K. LITTLE, Esq., Attorney for Defend-
ant Herta Marlow.

Memorandum.

RUDKIN, District Judge.

This is a controversy over life insurance between the administrator of the estate of the insured and the assignee of one claiming to be a beneficiary duly designated under the terms of the policy. The policy bears date May 29th, 1917, and is payable "to the executors, administrators or assigns of the insured, or to the duly designated beneficiary, (with the right on the part of the insured to change the beneficiary in the manner provided in section 6)." Section 6 provides as follows:

"The Insured may at any time and from time to time, change the beneficiary provided this Policy is not [16] then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for the endorsement of the change thereon by the Company, and unless so endorsed the change shall not take effect. After such endorsement the change shall relate back to and take effect as of the date the insured signed said written notice of change whether the Insured be living at the time of such endorsement or not. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured."

The insured died on the 30th day of May, 1919, and satisfactory proofs of death have been furnished. On the 18th day of March, 1918, the insured

filed at the San Francisco branch of the company a direction to change the beneficiary to Miss Jennie Heppner. At that time, and thereafter continuously until after the death of the insured, the policy was in the possession of one Janwitz, in the City and County of San Francisco, as security for the repayment of certain moneys due Janwitz from the insured, and for that reason the insured was unable to surrender the policy or to procure the endorsement of the change of the beneficiary on the policy. Under these facts counsel for the administrator contend that there could be no change of beneficiary because of the assignment of the policy and that in any event no such change was made. Whether there was an assignment of the policy may admit of question. There is a difference between an assignment and a pledge as collateral security. In the case of an assignment the legal title vests in the assignee, whereas, in the case of a pledge the title remains in the pledgor subject to the lien. Again [17] there is a wide difference between an assignment and a change in the beneficiary. The insured may assign the policy as a matter of course without notice to the insurer, whereas, a change in the beneficiary creates a new contract between the insurer and the insured. If the insured in this case had done everything required of him to make the change, it may well be that a court of equity would consider as done that which ought to have been done. But no such state of facts is presented here. The insured lived for more than a year after notice of the intended change was given and no attempt was made by him to produce the policy and the policy was

never presented at the Home Office for endorsement and no such change was every endorsed upon the policy. Indeed, as I view the law, the insurer could not be compelled to make the change so long as the policy was pledged for the pledgee had an interest in the policy which was inconsistent with an absolute right on the part of the insured to insist upon a change of beneficiary. A decree will, therefore, be entered in favor of the administrator subject, of course, to the rights of the assignee of the pledgee.

November 26th, 1920.

[Endorsed]: Filed Nov. 27, 1920. Walter B. Mal-
ling, Clerk. [17½]

At a stated term, to wit, the November term, A. D. 1920, of the Southern Division of the United States District Court, for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Saturday, the 27th day of November, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this court:

No. 512—EQUITY.

NEW YORK LIFE INSURANCE CO.

vs.

CHARLES PAGANINI, Administrator, etc., and
HERTA MARLOW.

(Order for Decree).

This suit heretofore tried and submitted, being now fully considered and the Court having filed its memorandum opinion, it is ordered that a decree be signed, filed and entered, in accordance with said opinion, in favor of Charles Paganini, as administrator, etc., subject to the rights of the assignee of the pledgee. [18]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Decree.

This cause came on to be heard at this November term, A. D. 1920, upon the written statement of the defendant, Herta Marlow, and the answer thereto of the defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and the oral admission of all the allegations of said

written statement, made by said last-named defendant in open court on said hearing, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.:

That defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, is the owner of and entitled to \$3,997.88 of the proceeds of the life insurance policy mentioned in said written statement on file herein, on deposit in this court, which sum of \$3,997.88 the clerk of this court is hereby directed to forthwith pay to said defendant out of said deposit.

That the defendant, Herta Marlow, is the owner of and [19] entitled to \$595.97 of the proceeds of said life insurance policy, on deposit in this court, which sum said clerk of said court is hereby directed to forthwith pay to said defendant out of said deposit.

That said clerk is entitled to the balance of said moneys on deposit in this court, to wit: \$49.35, as fees in this suit.

Dated this 2d day of December, 1920.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed and entered December 2, 1920.
Walter B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk. [20]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Statement of Evidence.

This cause came on to be heard in the above-entitled court on the 10th day of November, 1920, before Honorable Frank H. Rudkin, Judge of the United States District Court for the Eastern District of Washington, designated to hold court in the United States District Court for the Northern District of California during the months of November and December, 1920.

Ernest K. Little, Esq., appearing as solicitor for defendant Herta Marlow, and C. F. Reindollar, Esq., and Walton C. Webb, Esq., appearing as solicitors for defendant Charles Paganini, as administrator of the estate of David K. Marlow, deceased.

The plaintiff having been released from all further liability by decree made and given the 6th day

of July, 1920, did not appear and was not represented.

Whereupon the following proceedings were had:

Solicitors for defendant Charles Paganini, as administrator of the estate of David K. Marlow, deceased, stated in open court [21] that said defendant admitted the truth of all of the allegations of the written statement of Herta Marlow of the facts and circumstances upon which her claim is founded, except paragraph XIV thereof, which contained a statement of the theory of her claim rather than any allegation of fact.

The Court directed that such admission of counsel be entered upon the record and that the testimony be closed.

The solicitors for the respective parties thereupon presented oral arguments, at the conclusion whereof the cause was submitted, the respective parties to furnish the Court with points and authorities in writing, which was done.

ERNEST K. LITTLE,

Solicitor for Defendant Herta Marlow.

We hereby stipulate that the foregoing statement of appeal is correct in all particulars and that the same may be immediately settled and allowed by the Court, the ten-day notice thereof being hereby waived.

WALTON C. WEBB,

C. F. REINDOLLAR,

Solicitors for Charles Paganini, as Administrator
of the Estate of David K. Marlow, Deceased.

Statement allowed this 17th day of December, 1920.

FRANK H. RUDKIN,
District Judge.

[Endorsed]: Filed Dec. 20, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Petition on Appeal of Defendant, Herta Marlow.

The above-named defendant, Herta Marlow, considering herself aggrieved by the decree made and entered on the 2d day of December, 1920, in the above-entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and she prays that this appeal may be allowed and that a transcript of the record, proceed-

ings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

ERNEST K. LITTLE,
Solicitor for Defendant Herta Marlow.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Assignment of Errors.

Herta Marlow, one of the defendants above named, and appellant, hereby assigns errors on the decree of the United States District Court for the Northern District of California, Second Division, in the above-entitled cause, dated the 2d day of December, 1920, and the memorandum opinion and order of Hon. Frank H. Rudkin, United States

District Judge for the Eastern District of Washington, designated to hold court in the Northern District of California, filed November 27th, 1920, in the following particulars:

First: Because said Court erred in holding that a designation of beneficiary or change of beneficiary in a life insurance policy must be endorsed in the policy during the lifetime of the insured, notwithstanding the fact that the policy provides that such endorsement may be made after the death of the insured.

Second: Because said Court erred in holding that the pledgee of an insurance policy has an interest in the policy [24] which is inconsistent with the right of the insured to designate or change the beneficiary.

Third: Because said Court erred in holding that the designation of beneficiary executed by the insured and filed with the agent of the insurance company during his lifetime was invalid because the policy was at the time deposited as a pledge.

Fourth: Because said Court erred in holding that the designation of beneficiary executed by the insured was invalid because not endorsed on the policy during the life of the insured, notwithstanding the fact that the policy provided that such endorsement might be made after the death of the insured.

Fifth: Because the said Court erred in decreeing that the proceeds of the policy of life insurance in question, or any part thereof, should be paid to the

defendant, Charles Paganini, as administrator of the estate of the insured.

Sixth: Because said Court erred in not decreeing that the proceeds of the policy of life insurance in question should be paid to the defendant, Herta Marlow, as the assignee of the interest of the designated beneficiary.

ERNEST K. LITTLE,
Solicitor for Defendant Herta Marlow.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Order Allowing Appeal.

The defendant, Herta Marlow, having heretofore filed herein her petition for appeal and assignment of errors, said appeal is allowed to petitioner, and Charles Paganini, as administrator of the estate of

David K. Marlow, deceased, may be made appellee, Said appeal is to operate as a supersedeas of the decree of December 2d, 1920, upon the execution of a bond in the penalty of \$250.

The National Surety Company is accepted on said bond as surety, and said bond is now approved.

W. H. HUNT,
Judge.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that National Surety Company, a corporation, organized under the laws of the State of New York, and authorized to become surety on bonds in the State of California, as surety, is held and firmly bound unto the above-named Charles Paganini, as

administrator of the estate of David K. Marlow, deceased, in the sum of Two Hundred and Fifty Dollars (\$250), to be paid to said Charles Paganini, as administrator of the estate of David K. Marlow, deceased, and for the payment of which well and truly to be made, said National Surety Company binds itself and its successors, firmly by these presents.

Sealed with the seal of National Surety Company and dated this 8th day of December, 1920.

WHEREAS, the above-named Herta Marlow has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree made and given in the above-entitled suit in the United States District Court for the Northern District of California, in Equity, on the 2d day of December, 1920. [27]

NOW, THEREFORE, the condition of this obligation is such that if the above-named Herta Marlow shall prosecute her said appeal to effect and answer all damages and costs if she fail to make such appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[Seal] NATIONAL SURETY COMPANY.

By FRANK L. GILBERT,

Its Attorney in Fact. [28]

State of California,

City and County of San Francisco,—ss.

On this 8th day of December, in the year one thousand nine hundred and twenty, before me, John McCallan, a notary public in and for the City and

County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National Surety Company, the corporation described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of
San Francisco, State of California.

(The premium charged for this bond is Ten Dollars per annum.)

Bond approved—Dec. 9, 1920.

WM. H. HUNT, J.

[Endorsed]: Filed Dec. 9, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator of the
Estate of DAVID K. MARLOW, Deceased,
and HERTA MARLOW,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the United States District Court:

Please prepare transcript of record on appeal from the final decree in the above-entitled suit and incorporate therein the following, viz.:

1. Interlocutory decree filed July 6th, 1920.
2. Written statement of Herta Marlow of the facts and circumstances upon which her claim is founded.
3. Order designating Judge Rudkin to hold court in the Northern District of California during the months of November and December, 1920.
4. Memorandum opinion of Judge Rudkin filed November 27, 1920.
5. Minute order of November 27, 1920.
6. Statement of Evidence.

7. Final decree of December 2d, 1920.
8. Petition for order allowing appeal. [30]
9. Assignment of errors.
10. Order allowing appeal.
11. Bond on appeal.
12. Citation.

ERNEST K. LITTLE,

Solicitor for Defendant and Appellant, Herta Marlow.

Due service and receipt of a copy of the within praecipe for transcript of record is hereby admitted this 23d day of December, 1920.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitor for Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased.

[Endorsed]: Filed Dec. 27, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

(Title of Court and Cause.)

Praecipe of Appellee as to Transcript of Record.

To the Clerk of the United States District Court:

Please incorporate in the transcript of record on appeal in this suit, requested in and by the praecipe of the appellant, Herta Marlow, in addition to the papers and matters therein mentioned, the following:

I. The following excerpts from the Policy of Insurance mentioned in paragraph II of the written statement of Herta Marlow of the facts and

circumstances upon which her claim is founded and thereby made a part thereof, sufficiently identifying the same as portions of said policy or of the application attached thereto, as the case may be, viz.:

1. The first twelve lines of said policy, inserting said lines just as they appear in the policy with the indexing words in the same positions they there occupy.

2. The paragraphs of Section 6 thereof entitled "Assignment" and "Change of Beneficiary."

3. The first sentence of the paragraph of Section 6 thereof entitled "Miscellaneous Provisions," which sentence reads as follows: "The policy and the application therefor, copy of which is attached hereto, constitute the entire contract."

4. Section 6 of the application attached to said policy, which relates to the beneficiary thereof, and also so much of said application as shows the signature of David Kleinert Marlow thereto and that such paper is said application.

II. Answer of defendant, Charles Paganini, as administrator of the estate of David K. Marlow, deceased, to written statement of Herta Marlow.

Also please deliver to the United States Circuit Court of Appeals for the Ninth Circuit with such transcript of record [32] on appeal the policy of insurance annexed to the bill of interpleader in this suit on file in your office.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitors for Defendant and Appellee, Charles Paganini, as Administrator, etc.

It is hereby stipulated and agreed that the matters mentioned in the foregoing praecipe, in addition to the matters mentioned in the praecipe of the appellant Herta Marlow, be incorporated by the clerk of said court, in the transcript of record on appeal in this suit requested in and by said praecipe, and that the policy of insurance mentioned in the foregoing praecipe be delivered by the clerk as therein requested.

ERNEST K. LITTLE,

Solicitor for Defendant and Appellant, Herta Marlow.

C. F. REINDOLLAR,

WALTON C. WEBB,

Solicitors for Defendant and Appellee, Charles Paganini, as Administrator, etc.

So ordered.

HUNT,

Judge.

[Endorsed]: Filed Jan. 3d, 1921. Walter B. Maling, Clerk. [33]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 512—EQUITY.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Plaintiff,

vs.

CHARLES PAGANINI, as Administrator, etc.,
and HERTA MARLOW,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty-three (33) pages, numbered from 1 to 33 inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipes for transcript of record as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$13.90; that said amount was paid by Ernest K. Little, Esq., attorney for Herta Marlow; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 3d day of January, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [34]

Citation.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Herta Marlow, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Judicial Circuit, this 9th day of December, A. D. 1920.

WM. H. HUNT,

United States Circuit Judge.

United States of America,—ss.

On this 18th day of December, in the year of our Lord one thousand nine hundred and twenty, personally appeared before me, ———, the subscriber, Ernest K. Little, and makes oath that he delivered a true copy of the within citation to Walton C. Webb, attorney and solicitor for defendant and appellee, Charles Paganini, as administrator, etc., on the 10th day of December, 1920.

ERNEST K. LITTLE,

Subscribed and sworn to before me at San Francisco, Cal., this 18th day of December, A. D. 1920.

[Seal]

J. A. SCHAERTZER,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 512. United States District Court for the Northern District of California, Second Division. Herta Marlow, Appellant, vs. Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased. Citation on Appeal. Filed Dec. 18, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Due service and receipt of a copy of the within Citation is hereby admitted this ——— day of December, 1920.

—————,
Solicitor for Defendant Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased.

[Endorsed]: No. 3629. United States Circuit Court of Appeals for the Ninth Circuit. Herta Marlow, Appellant, vs. Charles Paganini, as Administrator of the Estate of David K. Marlow, Deceased, Appellee. Transcript of Record. Upon Appeal from the Southern Division of United States District Court for the Northern District of California, Second Division.

Filed January 6, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3629

IN THE

2

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,

Appellant,

VS.

CHARLES PAGANINI, as administrator of the
estate of David K. Marlow, deceased,

Appellee.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California, Second Division.

BRIEF FOR APPELLEE.

WALTON C. WEBB,

C. F. REINDOLLAR,

Solicitors for Appellee.

FILED

1914-5

No. 3629

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,

Appellant,

VS.

CHARLES PAGANINI, as administrator of the
estate of David K. Marlow, deceased,

Appellee.

Upon Appeal from the Southern Division of the United States District
Court for the Northern District of California, Second Division.

BRIEF FOR APPELLEE.

Statement of the Case.

We think that the following matters should be added to the statement of the case made by appellant, namely:

The insured did not execute a *change* of beneficiary as stated in appellant's brief, but merely a *direction* to change the beneficiary to Miss Jennie Heppner, who, four months after the death of insured, transferred to appellant whatever rights she acquired by virtue thereof;

Not only at the time of the execution of said direction to change beneficiary and thereafter until the death of insured, but also after the death of insured and until October 20, 1919 (almost five months after his death), when appellant purchased the claim and rights of Ben Janowitz, the policy was held by Ben Janowitz as a pledge to secure the payment of the sum of \$491.12 and interest due to him from the insured;

Appellant did not *pay* the sum for which the policy was pledged, as she says in her brief, but purchased from Ben Janowitz on October 20, 1919, the said indebtedness of insured to him and said pledge and now claims that she is the owner thereof;

The policy was not presented to the company until November, 1919, which was more than five months after the death of insured, and at that time appellant demanded of the insurance company that it pay to her the proceeds of the policy, not only on the ground that she was the assignee of Miss Jennie Heppner, but also on the ground that she was the assignee of Ben Janowitz;

So that the matter may not be confused, we will now restate in a few words the facts of the case as embodied in the statement of the case made by appellant, amended as above. The material facts of the case, irrespective of the provisions of the policy, are as follows: Prior to March 18, 1918, the insured delivered and pledged the policy to Ben Janowitz as security for the payment of the sum of \$491.12 and interest, which pledge has since continued, the

same and possession of said policy being held by Ben Janowitz until October 20, 1919, and thereafter by the appellant under assignment made by him to her on said day.

On March 18, 1918, the insured delivered to the San Francisco branch office of the insurance company a direction to change the beneficiary of the policy to Miss Jennie Heppner, the same not being forwarded to the home office of the company until after the death of the insured, which occurred on May 30, 1919. On October 1, 1919, Miss Jennie Heppner transferred to appellant whatever rights she acquired by virtue of said direction to change beneficiary.

The insured never produced the policy or delivered it to the company for endorsement thereon of the proposed change. And in November, 1919, for the first time the policy was produced, the appellant then presenting it to the company at its home office and demanding that said direction to change beneficiary be endorsed thereon and that the company pay to her the amount of the policy not only as assignee of Miss Jennie Heppner but also as assignee of Ben Janowitz.

Upon these facts, in connection with the provisions of the policy, the district court held, as contended by us, that the attempted change of beneficiary was invalid for two reasons:

First, because the policy was already assigned;

Second, because the policy was not delivered to the insurance company during the lifetime of the insured.

And in accordance with such conclusions, rendered the decree appealed from, which gives to appellant the amount due her under said pledge and to appellee, who is the administrator of insured's estate, the balance of the proceeds of the policy.

Argument.

We will discuss the two reasons, upon which the district court based its decision, in the order above named.

I.

THE POLICY WAS ASSIGNED.

The policy, as set forth in appellant's brief, provides that the beneficiary may be changed if the policy is not then assigned. So, the question to be determined is, whether the pledge to Ben Janowitz constituted an assignment within the meaning of this provision of the policy. We think there is no doubt but what it did constitute such an assignment.

The case of *Underwood v. Jefferson Standard Life Insurance Company*, 98 S. E. 832, practically so decides. This case is the only case we have been able to find where an assignment for security has been passed upon in relation to a provision prohibiting a change of beneficiary where the policy

has been assigned. In this case the policy provided, as does ours, that the beneficiary could be changed if the policy were not assigned. The policy was assigned as security, but to the insurance company, and not to a stranger. The court held that the assignment referred to in the policy meant an assignment to a stranger, and not one to the company, but did not even intimate that an assignment for security was not an assignment within the meaning of the provision that the beneficiary could be changed if the policy were not assigned. So, as the assignment with which the court was dealing was an assignment for security, the following language from page 835 of the opinion must be taken as referring to such an assignment, viz.:

“The assignment spoken of is one to a stranger, and not one to the company, for the latter could waive any objection to the change of beneficiary, and did so by assenting to the one that was made in this case. When a stranger is assignee his rights could not be materially affected in the absence of his consent, and, consequently, the company, without authority for that purpose, could not waive for him. *The provision was inserted to prevent confusion or complication and to relieve the company from any danger of liability growing out of changing the beneficiary after the policy had been assigned.*”

This case is particularly valuable because it points out the reason for a provision in a policy only allowing a change of beneficiary when the policy is not assigned. As the court said, the reason is, to prevent liability to the company from changing the

beneficiary after the policy has been assigned. In other words, to prevent double liability to the company, that is, liability to the assignee and also to the new beneficiary. Now, in the case of a change of beneficiary after an absolute assignment there is no question but what the company would be liable to each for the amount of the policy. In the case of an assignment by way of pledge the company would not be liable to each for the amount of the policy unless the loan equalled that amount, but it would at any rate be liable to the pledgee for the amount of the loan and to the new beneficiary for the amount of the policy. As double liability would exist in both cases and as an absolute assignment concededly prevents a change of beneficiary, an assignment for security must do likewise. The mere possibility that the insured may pay off the loan can not affect the matter. The company has a perfect right to protect itself against a possible double liability and it has done so when it provides in its policy that the beneficiary can be changed only when the policy has not been assigned.

It must be remembered in determining what is meant by an assignment in the provision of the policy that the beneficiary can be changed only when the policy is not assigned, that such a provision is not to be construed strictly in favor of the insured but liberally and according to the objects to be accomplished thereby. This is so because such a provision does not curtail or prescribe limitations upon a right that the insured already

had, but gives him a right he would not otherwise possess. In other words, it is undisputed law that, if the policy does not give the insured the right to change the beneficiary, the beneficiary can not be changed at all (see *Yore v. Booth*, 110 Cal. 238). There are numerous other cases, but we deem it unnecessary to cite them, as the proposition is so well settled.

Giving such a provision a liberal construction and one consonant with the object to be accomplished thereby, to wit: the prevention of double liability to the company, an assignment must be held to include a pledge as well as an absolute assignment.

Counsel for appellant argues in his brief that a pledge does not pass the legal title to the pledgee, and that, therefore, the pledge to Ben Janowitz was not an assignment of the policy. Even if the title does not pass it would be absolutely immaterial, since the object of a provision prohibiting a change of beneficiary when the policy is assigned is, as is laid down in said case of *Underwood v. Jefferson Standard Life Insurance Company*, to prevent double liability to the company, which would exist whether the policy was merely pledged or absolutely assigned. So, it is really idle to speculate as to whether or not the legal title passed to Janowitz in considering the question as to what constitutes an assignment within the meaning of the provision of the policy prohibiting a change of beneficiary when the policy has been assigned.

As a matter of fact, however, the legal title, that is, a title necessary to enable the pledgee to collect and sue upon the same, passes by a pledge, at least so far as a pledge of insurance policies or other choses in action is concerned.

See *31 Cyc.* at pages 808-9, where it is said:

“Upon a contract of pledge, the general property in the things pledged remains in the pledgor, while a special property passes to the pledgee.”

Also *Gilman v. Curtis*, 66 Cal. 116, the opinion in which was written by Justice Ross, now a judge of this court. In that case a life insurance policy was pledged, and it was held that the legal title to it passed to the pledgee. And this case was decided long after the adoption of the sections of the California Civil Code cited in appellant's brief. See also *Widaman v. Hubbard*, 88 Fed. 806, a decision by the United States Circuit Court for the Southern District of California, the opinion being written by Judge Wellborn, where it was held that the pledgee of a life insurance policy took the legal title to it and could sue the insurance company for the amount of it without interference by the pledgor, he being accountable, of course, to the pledgor for the balance of the proceeds of the policy remaining after deducting the amount of the pledge. It was also held that in an interpleader suit by the insurance company the rights of the pledgee and pledgor could be determined, that is, the pledgee could be awarded the amount of his

pledge and the pledgor the balance of the proceeds of the policy.

In addition, we would refer the court to the case of *Haber v. Brown*, 101 Cal. Reports, which is one of the authorities cited by counsel for appellant as holding that the legal title does not pass to the pledgee, but which really holds that the legal title or such a title as is necessary to enable the pledgee to collect and sue upon the pledge does pass to the pledgee. At page 453 of the opinion the court said:

“But it seems clear, in view of the code provision (referring to Section 2888 of the California Civil Code previously referred to by the court in its opinion), that a mere endorsement of non-negotiable paper by way of pledge should be restricted in effect to an authority from the pledgor to the pledgee to enforce the obligation in his own name as trustee and agent for the pledgor, and to apply the proceeds in payment of the debt secured, accounting to the pledgor for any surplus collected.”

Counsel also cites said Section 2888 of the California Civil Code, which provides that a lien does not transfer title. This section, however, as construed in said case of *Haber v. Brown*, only retains in the pledgor the general property in the pledge, while the legal title or a title sufficient to enable the pledgee to collect or sue passes to him. And we would again call the court's attention to the fact that the above mentioned case of *Gilman v. Curtis*, which was decided about fourteen years after the adoption of said Section 2888, holds that a pledge

of a life insurance policy passes the legal title to the policy to the pledgee.

But, as a matter of fact, Section 2888 of the California Civil Code has no application whatsoever to the Janowitz pledge, because there is nothing to show that the pledge was made in California, and the law is that an assignment of a life insurance policy is governed by the laws of the place where it was made.

Wilde v. Wilde, 95 N. E. 295.

Counsel also quotes from the article on pledges in *31 Cyc.* to the effect that the legal title remains in the pledgor. But this statement must be deemed to be qualified by the above quoted excerpt from the same article on pledges to the effect that the general property remains in the pledgor while a special property passes to the pledgee.

The other cases cited by counsel, in addition to *Haber v. Brown*, only go to the point that the general property in a pledge remains in the pledgor, which, of course, no one disputes. The case of *Bibend v. Liverpool and London Fire and Life Insurance Company* might be thought to go farther and hold that no title of any kind passes to the pledgee, but it really does not. The question there involved was whether a pledge of a fire insurance policy nullified the insurance because it transferred the entire property in the insurance to the pledgee, who did not own the property insured and, therefore, had no insurable interest in it. The court

concedes that the pledgee had title to the policy so as to allow him to recover the amount of the policy from the insurance company, but holds, and rightly so, that the pledge of the insurance policy did not transfer the general property in it so as to nullify the insurance.

It is evident from the foregoing that the legal title, at least to the extent of allowing him to collect from and sue the insurance company upon the same, passes to a pledgee of a life insurance policy. And that is an added reason why such a pledge should be deemed to be an assignment of the policy within the meaning of a provision allowing a change of beneficiary only when the policy is not assigned.

Counsel for appellant does not raise the points, but for fear that the court might do so, we wish to show that it is no objection to the assignment to Janowitz that it was made orally or that no copy of it was filed with the company as required by the policy.

An insurance policy can be assigned orally. See *Nashville Trust Co. v. First National Bank*, 134 S. W. 311, and *Marcus v. St. Louis Mutual Life Insurance Company*, 68 N. Y. 625.

It was not necessary to file a copy of the assignment with the company. The last mentioned case of *Marcus v. St. Louis Mutual Life Insurance Company* so holds. In that case the policy provided that it could be assigned only with the written ap-

proval of the company, but did not provide that a failure to secure this would affect the assignment. The assignment that was made was not approved by the company. Held, that, nevertheless, it was valid.

This is exactly the situation in our case. Our policy provides (Transcript page 7) that a copy of the assignment shall be filed with the company, but does not provide that a failure to do so shall affect the assignment. Therefore, the assignment to Ben Janowitz was valid even though it be assumed that a copy or notice of it was not given to the company. We can not, however, assume this from the pleading (that is, the written statement) of the defendant, Herta Marlow (the appellant), but must assume just the contrary. For that pleading is silent as to whether notice of the assignment was given to the company. And, furthermore, it is apparent all through that pleading that Herta Marlow (the appellant) claims under the assignment as well as under the attempted change of beneficiary. Consequently she will not be permitted to say that the assignment was invalid.

From the foregoing discussion we think it is clear that the policy was assigned within the meaning of the provision thereof allowing a beneficiary to be changed only when the policy is not assigned. Therefore, the beneficiary could not be changed and the decision of the district court was correct. But, assuming that it could have been changed, it was not changed. And so the decision of the district

court is correct for that reason also. This brings us to a discussion of the second ground upon which the district court based its decision.

II.

THE POLICY WAS NOT DELIVERED TO THE INSURANCE COMPANY DURING THE LIFETIME OF THE INSURED.

The policy provides (Transcript pages 6-7) as follows:

“CHANGE OF BENEFICIARY.—The insured may at any time, and from time to time, change the beneficiary, provided this policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office *accompanied by the policy for indorsement of the change thereon by the company*, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the insured signed said written notice of change, whether the insured is living at the time of such indorsement or not.”

It is plain to be seen from this provision that there are two things to be done by the insured in order to accomplish a change of beneficiary, and not merely one, as contended by appellant's counsel. He asserts that all the insured has to do is to deliver a written notice of the proposed change to the company and that the policy may be delivered to the company after his death. This, of course, can not be so.

The policy provides that the insured must deliver to the company notice of the proposed change “*accompanied by the policy for endorsement of the change thereon by the company*”. This italicized language (italics ours) must have some effect. Its plain meaning is, that the policy must be delivered to the company either with the notice of the proposed change or at the latest before the death of the insured. Otherwise it would not be an act of the insured, at whose request, and at the request of no one else, can the beneficiary be changed.

We suppose that counsel gets his idea that the policy can be delivered to the company after the insured's death from the provision permitting the endorsement to be made after the insured's death. But this provision and the one requiring the delivery of the notice of the desired change and the policy have no connection. One relates to what the insured is to do and the other to what the company is to do. The obvious meaning of the two provisions is, that if the insured delivers to the company during his lifetime notice of the proposed change of beneficiary and the policy, then the change may be endorsed on the policy by the company after his death. And the provision permitting the endorsement after death was undoubtedly inserted in the policy merely to prevent the contention being made that the endorsement must be made during the lifetime of the insured. For there would be no reason in denying effect to the change where the insured had in his lifetime done everything required of

him, namely, the delivery to the company of notice of the proposed change and the policy; and the company could not or did not endorse the change on the policy until after the insured's death.

We are unable to find any authorities either for or against our interpretation of the policy, but as appellant's counsel does not cite any sustaining his contention that the policy may be delivered to the company after the insured's death, we feel confident that the matter is too clear for dispute and that the correct construction of the policy is, that if the insured delivers to the company in his lifetime notice of the change of beneficiary and also the policy, then the company can endorse the change on the policy after his death.

Since, in our case, it appears that the policy was not delivered to the company during the lifetime of the insured, and there is no showing that the insured made any effort to get the policy and present it to the company, in other words, that he tried to do everything required of him to accomplish a change of beneficiary, there has not been, under the authorities, a change of beneficiary.

Abbott v. Supreme Colony United Order etc.,
190 Mass. 67.

A certificate of life insurance in a fraternal society provided that a change of beneficiary could only be made by a writing witnessed by two reputable witnesses and acknowledged before a justice of the peace or other officer, and that if not so made it would not be effectual. The insured was

sick in the hospital and signed and acknowledged before a justice of the peace a written change of beneficiary. The justice tried to get two witnesses but could not, as the rules of the hospital allowed only one visitor a day to a patient. Afterwards the justice signed as a witness and delivered the change of beneficiary to the local office of the lodge before the death of the insured. The court held that the change of beneficiary was not accomplished. It also called attention to the fact that it did not appear that what the insured desired to do was brought to the attention of the hospital authorities, as in that event they might have allowed him to have the two witnesses. In other words, the insured did not do everything he could during his lifetime to comply with the terms of the policy.

That is exactly the situation in our case. It appears from the pleading of Herta Marlow that the policy was not delivered as required thereby to the company with the change of beneficiary, or, in fact, until long after the death of David K. Marlow, the insured. And it does not appear that the insured made any effort whatever to get the policy from Ben Janowitz. Therefore, the policy not being complied with and there being no effort to comply with it, there has been no change of beneficiary.

Bagley v. Miller, 137 Ill. App. 278.

In this case after the insured was divorced from his wife he delivered to the company a written request to change the beneficiary from his wife to his sister. The company refused because he did not

deliver the policy to it, as required thereby. He tried to get the policy from his wife, but failed. Thereafter he took no further steps to effect the change of beneficiary and became more or less friendly with his wife again. Held, that it would seem that he had abandoned his intention of changing the beneficiary and that the beneficiary was not changed. The court also held that a beneficiary under a life insurance policy cannot be changed unless the policy permits, and then only in the manner prescribed thereby.

It must be presumed in our case that David K. Marlow abandoned his intention of changing the beneficiary by reason of the fact that he made no effort to get the policy from Ben Janowitz, if such presumption were necessary. But it is not, as the mere fact that he did not deliver the policy to the company during his lifetime and made no effort to get it so that he could deliver it is sufficient to defeat the change of beneficiary.

French v. Provident Savings Life Assurance Society, 91 N. E. 577.

The insured delivered a change of beneficiary to the company but did not deliver the policy to the company, as required thereby, saying that she could not find the policy but would send it when she found it. The company informed her that she could make application for a duplicate policy so that the change could be endorsed thereon, but she never did anything about obtaining the duplicate.

Held, that the attempted change of beneficiary did not become effective.

McLaughlin v. McLaughlin, 104 Cal. 171.

Case of fraternal society insurance. The laws of the society provided that beneficiary could be changed by surrendering the certificate and having a new one issued. The certificate was payable to the nephews and nieces of the insured. After his marriage he handed the certificate to his wife and told her it was hers. Upon his deathbed he asked his brother to have a new certificate issued to his wife. His brother gave him to understand that he had attended to it. This was not true. Held, that there was no change of beneficiary. Held, further, that this case was not one where the surrender of the certificate or policy is excused because the insured had done everything in his power to surrender it.

Tillmann v. John Hancock Mutual Life Insurance Co., 50 N. Y. S. 470.

The policy in this case, which was payable to the estate of insured, provided that the insured could change the beneficiary with consent of the company by written notice to the company. Insured signed a paper changing the beneficiary to the plaintiff and delivered it to a branch office of the company, which forwarded it to the home office, where it was received before the insured's death. The branch office received it back from the home office the day of the insured's death, but without the company's consent, and with a letter asking the reason for

the change of beneficiary and for other information. Thereafter the company refused its consent to the change. The court held that no change of beneficiary had been made. And also that the company could not give its consent after the death of the insured, for then the rights of the original beneficiary were vested.

De Silva v. Supreme Council, 109 Cal. 373.

In this case a change of beneficiary was attempted to be made by will. The court held that this could not be done, saying that all acts to be done by the insured in order to effect a change of beneficiary must be performed by him during his lifetime.

Counsel for appellant states that we cited on the argument in the district court cases that were not in point because they involved policies where the change of beneficiary was to be endorsed on the policy during the lifetime of the insured. In this he is mistaken, although it does not make a particle of difference whether the endorsement is to be made after or before death so far as the provision of the policy, requiring the insured to deliver to the company notice of the change as well as the policy, is concerned. Counsel is also mistaken in his statement that the case of *Supreme Lodge v. Price*, which, however, we did not cite, is not in point for the same reason. In that case there was nothing requiring the change of beneficiary to be endorsed by the company during the lifetime of the insured, yet the court held that the insured must deliver to the company not only a request for the

change but the policy (certificate of insurance) as well. The language from the opinion, quoted on pages 15-16 of appellant's brief, might seem to excuse the presentation of the certificate to the company by the insured in case the request for the change was delivered to it and there were substantial, although purely sentimental, reasons for the proposed change. But this language is purely dictum, since the request for the change was not delivered to the company, and is, furthermore, contrary to all the authorities, which, at the most, only excuse the presentation of the certificate or policy when the insured has done everything in his power in order to deliver it. In any event, however, this language has no application to our case, as there are no reasons whatsoever shown for the proposed change of beneficiary to Miss Jennie Heppner.

Although appellant's counsel does not raise them, we wish to clear up two points for fear that the court might have some doubt about them.

First. A change of beneficiary from the executor or administrator of the insured to a named beneficiary is the same as any other change of beneficiary.

Lewis v. Reed, Vol. 32 Cal. App. Dec. 1009.

This case was decided July 29, 1920, and a rehearing has been denied by the Supreme Court of California. It does not expressly appear from the opinion of the court, but it does so appear from the original record of the appeal on file that the policies were payable to the executor or administrator of

the insured. The insured sought to change the beneficiary to plaintiff, an individual, but did not comply with the provisions of the policies as to a change of beneficiary. The court held that the change was ineffective, and at page 1010 of the opinion said:

“To permit a substitution of an individual in lieu of the executors or administrators of an insured’s estate, certainly would work a material change in the contract, and one which, under the terms of the policy, required the assent of the insurer in the manner prescribed before becoming effectual.”

Tillmann v. John Hancock Mutual Life Insurance Co., 50 N. Y. S. 470 (cited above).

This case holds the same thing. There the policy was payable to the estate of insured and he sought to change the beneficiary to an individual.

Second. The fact that the policy is payable to the executor or administrator of the insured “or to the duly designated beneficiary” can not entitle the insured to change the beneficiary from his executor or administrator to a designated beneficiary without complying with the provisions of the policy relating to a change of beneficiary. Appellant’s counsel did, however, contend to the contrary in the district court, but as he has abandoned his contention in this court, he has undoubtedly concluded that the district court was right in disapproving his contention, as it most certainly was.

Counsel’s contention was that the insured could name a beneficiary without complying in any way with the provisions of the policy. In other words,

that the company had nothing to do with the matter, and that if he named a beneficiary such person became the beneficiary under the policy without further action on his or the company's part. This surely can not be so.

Counsel apparently went on the theory that the policy did not designate a beneficiary when it was made payable to the executor or administrator of the insured and that the naming of a beneficiary was an original designation and not a change of beneficiary. But in this he is mistaken. We have seen from the cases above cited that if a policy is made payable to the executors or administrators of the insured, such persons are the beneficiaries of the policy and that the naming of a person in place of them is a change of beneficiary. And the policy itself and the application therefor show plainly that the executors or administrators of the insured were intended to be and actually were designated as beneficiaries of the policy. See page 12 of the Transcript, where there is set forth the following provision of the policy:

“Miscellaneous Provisions—the policy and the application therefor, copy of which is attached hereto, constitute the entire contract”,

and also the following provision of the application therefor signed by the insured:

“I designate as beneficiary to receive the proceeds of policy in event of death, and reserve the right to change the beneficiary from time to time—beneficiary (give name in full) estate.”

And see page 2 of appellant's brief to the same effect.

See also page 11 of the Transcript where it appears that the different provisions of the policy are indexed on the margin thereof and that opposite the indexing word "beneficiary" there appear the words "to the executors, administrators", etc.

So it is apparent that the executors or administrators of the insured are the beneficiaries of the policy; therefore, the naming of another person as beneficiary must be a change of beneficiary and must be done according to the provisions of the policy regarding a change of beneficiary.

If this were not so then a beneficiary could be named although the policy was assigned, in which event the company would be subjected to double liability. Such a result would most certainly not be tolerated.

Another thing to be remembered in this connection is, that the words "designated beneficiary" are preceded by the word "duly". This word must have some significance. Its plain meaning is, "according to the terms of the policy". Therefore, the words "duly designated beneficiary" mean a beneficiary designated according to the terms of the policy. In other words, as the executors or administrators were already the beneficiaries of the policy, if the insured desired to name another person

as beneficiary he must do so "according to the terms of the policy", namely, by complying with the terms thereof in regard to a change of beneficiary.

And it must be borne in mind that the words "to the duly designated beneficiary", as used in this connection, undoubtedly do not mean, to such person as the insured may duly designate, but to such person as may be named, that is, called by name, as beneficiary, the executors or administrators not being, of course, called by name. In other words, the word "designated" is not referring to the act of appointing a beneficiary, but to the person who may be named, that is, called by name, as beneficiary, selected pursuant to the terms of the policy in regard to a change of beneficiary.

And further it must not be forgotten, as we have shown above, that provisions in a policy regarding a change of beneficiary are not to be construed in favor of the insured but liberally and so as to carry out the objects to be attained thereby, since provisions relating to a change of beneficiary do not curtail a right the insured already had but give to him a right he did not before possess, namely, the right to change the beneficiary.

We think it must be apparent to the court that the beneficiary was not changed because the policy was not delivered to the company during the lifetime of the insured, and that the decree of the district court is correct not only for that reason but because the beneficiary could not be changed for

the reason that the policy was assigned. We, therefore, respectfully ask that the decree be affirmed.

Dated, San Francisco,

March 1, 1921.

WALTON C. WEBB,

C. F. REINDOLLAR,

Solicitors for Appellee.

No. 3629

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,

Appellant,

VS.

CHARLES PAGININI, as administrator of the
estate of David K. Marlow, deceased,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

ERNEST K. LITTLE,

68 Post Street, San Francisco,

*Attorney for Appellant
and Petitioner.*

FILED

JAN 30 1922

**F. D. MONCKTON,
CLERK**

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APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Having carefully examined the opinion of the Honorable Court we think that with propriety we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellant upon the following grounds:

I.

We believe that the opinion of this court does not take into account the fact that the policy in

question, in definite and express terms establishes the date as of which a change of beneficiary shall take effect as the date when the insured signed the written notice of change and that all other conditions relating to change of beneficiary are conditions subsequent, which, in their nature and under the express terms of the policy, may be performed as well after as before the death of the insured; and, while performance of these conditions subsequent was necessary in order to prevent the change of beneficiary from being defeated, the time of performance thereof has no bearing upon the date as of which the change is effective.

The portion of the policy prescribing the mode of change of beneficiary consists of two sentences and reads as follows:

“Every change of beneficiary must be made by written notice to the company at its Home Office accompanied by the Policy for indorsement of the change thereon by the company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate to and take effect as of the date the insured signed said written notice of change whether the insured be living at the time of such indorsement or not.”

A critical examination of the foregoing provisions of this policy in relation to the method of effecting a change of beneficiary will show:

1. That the policy does not provide that the change of beneficiary shall not take effect “*until*”

indorsed on the policy, but that it shall not take effect “*unless*” so indorsed;

2. That any change of beneficiary, after such indorsement, shall “take effect as of the date the insured signed the written notice of change”, and not as of the date of presentation of the written notice to the company at its Home Office;

3. That there is no express provision of the policy that the insured shall take any preliminary steps whatsoever looking to the indorsement of the change of beneficiary on his policy during his lifetime; and

4. That the policy expressly provides that every such notice, without limitation as to time of presentation for indorsement, may be indorsed on the policy whether the insured be living or not, and when so indorsed shall relate to and take effect as of the date when the insured signed the written notice of change.

The appellee has not alleged fraud, accident or mistake and has not asked for a reformation of the contract, and it should require very potent reasons before we should now undertake to make a different contract for the parties than they made for themselves.

The company could in its contract dispense with immediate delivery of the written notice, as a condition precedent, and that is exactly what it did do when it inserted in its policy a provision that any notice of change of beneficiary, after indorsement on

the policy, should relate to and take effect as of the date when the insured signed the written notice, whether the insured be living at the time of such indorsement or not.

II.

We believe that the authorities cited by this court are not applicable to this case, because in each of the cases cited there was a clear failure on the part of the insured to comply with some condition precedent prescribed in the policy or by-laws of the insurance society, and hence the change of beneficiary was not effective as of a time prior to the death of the insured. Whereas, in the present case, the insured died May 30, 1919, and under the terms of his policy the change of beneficiary was effective as of March 18, 1918, the date when he signed the written notice of change, subject only to subsequent indorsement on the policy, upon presentation at the Home Office.

We will briefly review the cases cited in the opinion of this court.

In *Abbott v. Supreme Colony United, etc.*, 190 Mass. 67, the following indorsement appeared on the back of the certificate, viz.:

“A change of beneficiary in any other manner than as directed by the constitution will not be legal or binding on the order.”

The constitution provided as follows:

“Any member desiring to change his beneficiary shall give a written declaration thereof to the Secretary of the Colony signed by him and witnessed by two reputable witnesses and acknowledged before Justice of the Peace,” etc.

The written declaration by the insured was acknowledged before a Justice of the Peace and witnessed by him, but was signed by no other witness.

The citation of *French v. Provident Savings Life Assurance Society*, 91 N. E. 577, in the brief for appellee and in the opinion of this court seems to be an erroneous citation. But all that counsel for the appellee claims for the case is, that it holds that the policy must be produced for indorsement during the life of the insured, in a case where the policy expressly provides that this must be done.

In the case of *McLaughlin v. McLaughlin*, 104 Cal. 174, the constitution and laws of the order contained the following provision:

“Section 172. A member in good standing may, at any time, surrender his or her relief fund certificate, and a new certificate shall then be issued, payable to such person or persons related to or dependent upon him or her, as the member may direct, upon payment of the certificate fee (\$1).”

The member talked about changing the beneficiary, but died without surrendering the old certificate, without making application for change of beneficiary, and without paying the required fee.

In the case of *De Silva v. Supreme Council*, 109 Cal. 375, the court said:

“There is no by-law or constitutional provision of the society, or statute of the state, providing for a change or substitution of beneficiaries in a certificate of membership issued by this society.” * * * “Most of the decisions seem to concur in holding that, in case of mutual benefit societies, the beneficiary named in the certificate acquires no vested right to the benefit to accrue upon the death of the member, until such death occurs. The member may, therefore, during his lifetime, exercise the power of appointment without other limits or restrictions than such as are imposed by the organic law of the society or the rules and regulations adopted in conformity therewith.”

In that case the court held that a provision in the will of the insured disposing of the proceeds of the insurance did not operate as a change of beneficiary, but that a written declaration of change of beneficiary left among the papers of the insured would have been an effectual mode of exercising the right to change the beneficiary.

In the case of *Tillman v. John Hancock Life Insurance Co.*, 50 N. Y. Sup. 470, by the terms of the contract of insurance, the insured had the right

“to change the beneficiary from time to time, *with the consent of the company*, by written notice to said company”.

The notice was duly given and received by the Home Office, but the company withheld its consent to the proposed change of beneficiary.

In not one of the foregoing cases was there any provision contained in the policy, or constitution or by-laws of the society, which permitted the indorsement of the change of beneficiary or any other act in connection therewith to be made or performed after the death of the insured, and in not one of these cases was there any provision that a change of beneficiary should take effect as of a date prior to the full and final performance of the very last act to be performed in connection with such change of beneficiary.

Hence, those cases can be of no assistance in construing or applying the provision of the policy in question reading as follows:

“After such indorsement the change shall relate to and take effect as of the date the insured signed said written notice of change whether the insured be living at the time of such indorsement or not.”

Wherefore, upon the foregoing grounds this appellant respectfully prays this Honorable Court to give her a rehearing of said cause.

Dated, San Francisco,
January 30, 1922.

ERNEST K. LITTLE,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 30, 1922.

ERNEST K. LITTLE,
*Attorney for Appellant
and Petitioner.*

No. 3629

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For the Ninth Circuit

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Appellant,

VS.

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estate of David K. Marlow, deceased,

Appellee.

APPELLEE'S REPLY TO
APPELLANT'S PETITION FOR A REHEARING.

WALTON C. WEBB,

C. F. REINDOLLAR,

Solicitors for Appellee.

FILED

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F. D. MONCKTON,
CLERK

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Appellee.

APPELLEE'S REPLY TO APPELLANT'S PETITION FOR A REHEARING.

Appellant divides her petition for a rehearing in this case into two points, but in reality there is only one point, designated by appellant as number I, namely, that the opinion of this Court in this case does not give due consideration to the fact that the policy provides that when a change of beneficiary has been made it shall take effect as of the date when the insured signed the written notice of change of beneficiary. The other point, designated in appellant's petition as number II, is merely a criticism of the applicability of the cases cited in the opinion of this Court, which criticism is not justified.

This point of appellant, which is in effect that the provision of the policy in our case, that when a change of beneficiary has been made it shall take effect as of the date when the insured signed the written notice of change of beneficiary, permits the delivery to the company of the notice of change of beneficiary and the policy after the insured's death, was also made by appellant in her brief filed on the hearing of the appeal in this Court and was passed upon adversely by this Court in its opinion in this case, when this Court there held that the provision of the policy as to change of beneficiary providing for the delivery to the company of written notice of the change of beneficiary and the policy, meant delivery by the insured during his lifetime. It was not necessary for this Court to discuss this provision of the policy as to when a change of beneficiary takes effect as it was obvious that there had been no change of beneficiary.

Appellant seems to think that in determining under the policy in our case whether or not a change of beneficiary has taken place the controlling element is, the provision of the policy as to when a change of beneficiary takes effect, namely, the date the notice of change of beneficiary was signed, and that the other provisions of the policy as to how a change of beneficiary may be accomplished have no effect whatsoever. This, of course, cannot be so. As was held by this Court in its opinion in this case the controlling consideration in the matter is, whether the provisions as to the manner in which a

change of beneficiary may be accomplished have been complied with. And this Court also there held, as above pointed out, that the provisions of the policy that the notice of change of beneficiary must be delivered to the company at its Home Office, accompanied with the policy for endorsement of the change, means that these things must be done during the lifetime of the insured.

Under appellant's contention all the insured would have to do during his lifetime would be to sign a notice of change of beneficiary. He would not even have to deliver it to the proposed new beneficiary. But, assuming that appellant means that the notice would have to be so delivered by the insured during his lifetime, yet, under her contention, after his death the notice of change of beneficiary could be forwarded, together with the policy, to the company at its Home Office, and it would have to endorse the change of beneficiary upon the policy, whereupon it would take effect at the date that the insured signed the notice of change of beneficiary. Of course, this is ridiculous. If a change of beneficiary could under the policy be effected in such a manner the insurance company might be liable twice on the same policy, as it might, prior to knowledge that the insured had signed and delivered to the proposed new beneficiary a notice of change of beneficiary, pay the amount of the policy to the original beneficiary and then later on have to pay it over again to the new beneficiary when he presented after the insured's death the notice of change of

beneficiary and the policy for endorsement thereon of the change. This not at all improbable situation shows how utterly fallacious is this contention of appellant.

The provision in the policy in our case that the change of beneficiary when endorsed on the policy shall take effect as of the date when the insured signed the notice of change of beneficiary merely fixes the time when a change of beneficiary, made in accordance with the terms of the policy, takes effect, and does not specify the requisites necessary to accomplish a change of beneficiary. And this Court was correct in its opinion in this case in holding that, as the insured had not delivered to the insurance company during his lifetime the notice of change of beneficiary and the policy, no change of beneficiary had taken place. And it was, therefore, absolutely unnecessary for this Court, as above stated, to discuss in its opinion the provision of the policy as to the time of the taking effect of a change of beneficiary.

Appellant states that the cases cited by this Court in its opinion in this case, which cases were also cited by us in our brief, are not applicable to our case because in each of those cases there was a clear failure on the part of the insured to comply with some condition prescribed for a change of beneficiary. But that is exactly why these cases are applicable to our case. As above pointed out, the policy provides in effect that in order to change the beneficiary the insured must deliver to the company

at its Home Office during his lifetime a written notice of change of beneficiary and the policy for endorsement of the change thereon by the company. It is undisputed that the insured failed to do these things, and, therefore, the cases cited in the opinion of this Court are, as we said before, exactly in point, as they hold that where the insured is to do certain things in regard to a change of beneficiary and fails to do them the change is ineffective.

Appellant, in criticising these cases, states that the case of French against Provident Savings Life Assurance Society, 91 N. E. 577, seems to be an erroneous citation. We do not know exactly what appellant means by this, but if she means that the case is not found in the above report at the above page then she is mistaken. Appellant also says that in the case of De Silva against Supreme Council the Court held that a provision in the will of the insured was inoperative as a change of beneficiary, "but that a written declaration of change of beneficiary left among the papers of the insured would have been an effectual mode of exercising the right to change the beneficiary". The Court did hold that an attempted change of beneficiary by will was inoperative, but did not use the language above quoted or even mention or intimate anything to that effect.

It is respectfully submitted that the petition of appellant for a rehearing of this case should be denied.

Dated, San Francisco,
February 8, 1922.

WALTON C. WEBB,
C. F. REINDOLLAR.

No. 3629

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,

Appellant,

VS.

CHARLES PAGANINI, as administrator of the
estate of David K. Marlow, deceased,

Appellee.

APPELLANT'S SUPPLEMENTAL PETITION
FOR A REHEARING.

ERNEST K. LITTLE,

Foxcroft Building, San Francisco,

*Attorney for Appellant
and Petitioner.*

FILED

FEB 14 1922

**F. D. MONCKTON,
CLERK.**

No. 3629

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,

Appellant,

VS.

CHARLES PAGANINI, as administrator of the
estate of David K. Marlow, deceased,

Appellee.

APPELLANT'S SUPPLEMENTAL PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

In Appellee's Reply to Appellant's Petition for Rehearing (page 3) he undertakes to set forth reasons why the contract in this case should be revised in order to protect the company.

The bill for interpleader as amended, filed by the company in the District Court, shows that the company never entertained a doubt as to its right to make the indorsement in this case, so far as the time of presentment of the notice of change accompanied by the policy was concerned. In other words, the bill for interpleader as amended shows that the com-

pany, who prepared the contract, understood it in the sense contended for by this appellant, and, with such understanding of the contract, were ready and willing to comply therewith, and have not sought to have the contract revised, nor to have it interpreted as contended for by appellee.

The appellee now proposes to revise the clause in question to read as follows:

“In order to change the beneficiary the insured must deliver to the company at its Home Office during his lifetime a written notice of change of beneficiary and the policy for indorsement of the change thereon by the company.”

(Appellee's Reply, page 4, beginning with third from last line.)

The italicized words are the ones which the appellee seeks to have interpolated.

The proposed revision would constitute a radical change in the policy and, as appellee asks this revision solely for the protection of the company who prepared the contract, it becomes important to know how the company understood the contract and whether it was satisfied therewith.

Appellant therefore prays that the bill for interpleader, as amended, may be duly certified and added to the record in this case.

Dated, San Francisco,
February, 11, 1922.

ERNEST K. LITTLE,
*Attorney for Appellant
and Petitioner.*

No. 2039

United States
Circuit Court of Appeals

For the Ninth Circuit.

T. B. STORY and L. P. WORK, Co-partners Doing
Business Under the Firm Name and Style of
STORY & WORK,

Plaintiffs in Error,

vs.

R. N. STANFIELD,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District
Court of the District of Oregon.

FILED
JAN 20 1921
P. D. MCKINTON,
CLERK

No. _____

United States
Circuit Court of Appeals

For the Ninth Circuit.

T. B. STORY and L. P. WORK, Co-partners Doing
Business Under the Firm Name and Style of
STORY & WORK,

Plaintiffs in Error,

vs.

R. N. STANFIELD,

Defendant in Error.

Transcript of Record

**Upon Writ of Error to the United States District
Court of the District of Oregon.**

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Names and Addresses of Attorneys of Record

FREDERICK H. DRAKE, Esq., of Portland, Oregon, and C. B. NOLAN Esq., and WM. SCALION, Esq., both of Helena, Montana,

For Plaintiffs in Error.

MESSRS. BAUER, GREENE and McCURTAIN, of Portland, Oregon, and ED. R. COULTER, of Weiser, Idaho,

For Defendant in Error.

Transcript of Record

In the District Court of the United States for the
District of Oregon.

March Term 1919.

BE IT REMEMBERED, that on the 17th day of June, 1919, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint in words and figures as follows, to-wit:

In the District Court of the United States, District of
Oregon.

T. B. STORY and L. P. WORK, Co-partners Doing
Business Under the Firm Name and Style of
STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Complaint

The plaintiffs above named complain of the defendant, and for cause of action allege:

I.

That the plaintiffs, T. B. Story and L. P. Work, are now, and at all of the times hereinafter mentioned were, co-partners residing in Gallatin County, State of Montana, and doing business under the name and style of Story & Work, and as such were engaged at all of said times in buying and selling sheep and ewes; that their place of business is at Bozeman in said state, and at all of the times herein mentioned, they were and are citizens and residents of the state of Montana.

II.

That during all of the times herein mentioned and now the defendant R. N. Stanfield was and is a resident and citizen of the state of Oregon.

III.

That on the 26th day of May, 1917, the defendant sold to plaintiffs seven thousand (7,000) head of yearling ewes at the agreed price of eleven and 50/100 dollars (\$11.50) per head, delivery of same to be made July 1, 1917, at White Sulphur Springs, Montana, and at Three Forks, Montana.

IV.

That the defendant failed and refused to carry out his contract and failed and refused to make delivery to plaintiffs of said ewes at the time provided for in said contract, or at all.

V.

That by reason of the breach of said contract by defendant, plaintiffs have been damaged in the sum of twenty-one thousand dollars (\$21,000.00).

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of twenty-one thousand dollars (\$21,000.00), and for costs of suit.

F. H. DRAKE,

WM. SCALLON and

C. B. NOLAN.

Attorneys for Plaintiffs.

State of Montana,

County of Gallatin,—ss.

L. P. Work, being first duly sworn upon oath, deposes and says: That he is one of the plaintiffs named in the foregoing entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated on information and belief, and as to those matters he believes it to be true.

L. P. WORK.

Subscribed and sworn to before me this 27th day of May, 1919.

[Notarial Seal]

E. H. SCHUMACHER,

Notary Public for the State of Montana, Residing at
Bozeman, Montana.

My commission expires Jan. 5, 1920.

Endorsed: Title of Court and Cause. Complaint.

Filed June 17, 1919. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 21st day of January, 1920, there was duly filed in said Court a Demurrer in words and figures as follows, to-wit:

In the District Court of the United States, District of
Oregon.

T. B. STORY and L. P. Work, Co-partners Doing
Business Under the Firm Name and Style of
STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Demurrer

Comes now the defendant and demurs to the Complaint of Plaintiff and as grounds of Demurrer alleges:

I.

That said Complaint fails to state facts sufficient to constitute cause of action against this Defendant.

ED R. COULTER,

Attorney for Defendant.

Endorsed: Title of Court and Cause.

Filed Jan. 21, 1920. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 21st day of January, 1920, there was duly filed in said Court, a Motion, in words and figures as follows, to-wit:

In the District Court of the United States District of
Oregon.

T. B. STORY and L. P. WORK, Co-partners, Doing
Business Under the Firm Name and Style of
STORY & WORK,

Plaintiffs.

vs.

R. N. STANFIELD,

Defendant.

Motion

Comes now Defendant and moves the Court to require Plaintiff to make his complaint more definite and certain, in the following particulars:

I.

That it does not appear in said complaint whether the alleged sale of sheep mentioned in Paragraph III of the complaint was by a written contract. In the event that said alleged sale of yearling ewes is by written contract that the Plaintiff be required to attach copy of said written contract as a part of his Complaint.

ED R. COULTER,

Attorney for Defendant.

Endorsed: Title of Court and Cause. Motion.

Filed Jan. 21, 1920. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 21st day of June, 1920, there was duly filed in said Court an Amended Complaint in words and figures as follows, to-wit:

In the District Court of the United States, District of
Oregon.

T. B. STORY and L. P. WORK, Co-partners Doing
Business Under the Firm Name and Style of
STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Amended Complaint

Now come the plaintiffs above named, and file this
their amended complaint, leave for doing so having
been first obtained, and for cause of action against
the defendant, complain and allege:

I.

That at all of the times hereinafter mentioned, the
plaintiffs, T. B. Story and L. P. Work, were and are
co-partners in business residing at Bozeman, Gallatin
County, Montana, doing business there under the firm
name and style of Story & Work, and at all of such
times and as such were engaged in the livestock busi-
ness, and as such bought and sold ewes, and at all of
said times said plaintiffs were and are residents and
citizens of the state of Montana.

II.

That at all of the times hereinafter mentioned, the
defendant R. N. Stanfield was and still is a resident
and citizen of Stanfield, Umatilla County, State of
Oregon

III.

That at all of the times hereinafter mentioned, one William Rea, Jr. was and now is a livestock broker, engaged in the business of buying and selling livestock on commission, and known to be such to said plaintiffs and defendant, and for many years prior to the 25th day of May, 1917, and in many transactions involving the sale of livestock, including sheep, the said Rea as such broker at divers times purchased from and sold to the said Stanfield, the said defendant, several thousand head of sheep.

IV.

That on the 28th day of April, 1917, the said defendant entered into a contract with the plaintiffs through the said Rea, as broker as aforesaid, by the terms and provisions of which, the said Stanfield purchased from the said plaintiffs seven thousand (7,000) head of yearling ewes at a price agreed on, and under and by virtue of the terms of said contract, the said ewes were to be delivered by the said plaintiffs to the said Stanfield or order at White Sulphur Springs, Montana, and Three Forks, Montana, on July 1, 1917; that the said Stanfield at said time paid to the said Story & Work, as part payment for the purchase price of said ewes, the sum of four thousand dollars (\$4,000.00), copy of which said agreement is hereto attached marked Exhibit "A" and made a part hereof.

V.

That after said sale was made, as aforesaid, to the said Stanfield of said ewes through the said Rea as

broker as aforesaid, and on the 25th day of May, 1917, the said plaintiffs desiring to repurchase from the said Stanfield, the defendant herein, the said ewes and to purchase all of his rights in the said contract for sale of said ewes, as aforesaid, the said Rea acting as broker in that behalf, sent to the said defendant at his home in Oregon, from Billings in the State of Montana, a telegram reading as follows:

“May 25, 1917.

R. N. Stanfield,
Stanfield, Oregon.

Wire lowest price you will sell the Seven Thousand Story and Work yearling ewes.

Wm. Rea, Jr.”

meaning thereby, as the defendant knew, the ewes theretofore purchased by the said Stanfield from the said plaintiffs as hereinabove referred to;

That in reply to said telegram, the said Stanfield, on the afternoon of the 26th day of May, 1917, sent to the said Rea at Billings, Montana, a telegram from Portland, Oregon, reading as follows:

“Wm. Rea,
Billings, Mont.

Lowest price on Story and Work yearling ewes eleven fifty this subject to immediate acceptance.

(Signed) R. N. Stanfield.”

VI.

That at the time of the receipt of said telegram at Billings on the afternoon of the said 26th day of May, 1917, the said Rea had left the said city of Billings for the city of Butte, in the State of Montana, and the said telegram was forwarded to him by wire to

the said city of Butte, where the same was received by him at about eight o'clock on the evening of that date, and immediately upon its receipt by him, he, the said Rea, accepted for himself and on behalf of the said Story & Work the offer so made, as aforesaid, by then and there delivering for transmission at the Western Union Telegraph Company's office at the city of Butte, prepaying the charge for transmission of same, a telegram directed to the said defendant at his home at Stanfield, Oregon, said telegram reading as follows:

"Butte, May 26, 1917.

R. N. Stanfield,
Stanfield, Oregon.

Sold your Story and Work seven thousand yearling ewes eleven fifty. Mail you contract and check for seven thousand dollars tomorrow.

Wm. Rea, Jr."

and plaintiffs allege on information and belief that said telegram was thereupon sent to and received by the said Stanfield on the date named.

VII.

Plaintiffs further aver that in connection with the said transactions herein set forth, there was a well-known custom in the livestock trade, to-wit, the sheep trade, according to which immediate acceptance, in the offer referred to, meant that the offer should be accepted at least within 24 hours after the same was made and in that connection plaintiffs allege that in the instant case the acceptance of the offer by the plaintiffs and by the said Rea in their behalf was an immediate acceptance.

VIII.

Plaintiffs further aver that there was in the livestock, to-wit, the sheep trade, a custom and usage that where delivery of the livestock so sold was to be made in the future, there should be paid to the seller part of the purchase price not exceeding eight per cent of the estimated total price, unless otherwise agreed upon, and payable in money or negotiable instruments, and that transactions of that character could be carried on in the name of the broker without disclosing the principal's name;

That pursuant to said custom and agreeably to the terms of said contract of sale, and on the 27th day of May, 1917, the said Rea, for and in behalf of the plaintiffs, sent by mail postage prepaid, a letter addressed to the said defendant at Stanfield, Oregon, which letter enclosed a check for seven thousand dollars (\$7,000.00), and likewise enclosed said written memorandum of the contract of sale and purchase, copies of which letter, memorandum and check are hereto attached marked Exhibits "B", "B-1" and "B-2", and made a part of this Amended Complaint; that said check was good; that said Wm. Rea, Jr. Agt. had a checking account in the bank on which said check was drawn more than sufficient to pay the same, and that it would have been paid on presentation to said bank and was equivalent to cash.

IX.

Plaintiffs further aver that although said letter containing said check and said memorandum was received by the said defendant in due course of mail, the said

defendant failed and neglected to advise the said Rea in any manner regarding same until the 14th day of June, 1917, when the said Rea received by mail a letter from the said Stanfield returning said check, copy of which letter is hereto attached marked Exhibit "C", and made a part of said Amended Complaint, which letter bears date June 12th, 1917.

X.

Plaintiffs further aver that the customs and usages hereinbefore mentioned were known to plaintiffs and defendant and to the said Rea, and said dealings as evidenced by said telegrams and letters and as conducted by the said Rea for and in behalf of the plaintiffs, were carried on agreeably to said usages and customs, and that the same were generally and uniformly observed in the case of sales of livestock and particularly of sheep.

XI.

Plaintiffs further aver that by the sending of said letter bearing date June 12th, 1917, and received by the said Rea on the 14th day of June, 1917, and by the return of the check hereinabove referred to, the said Stanfield wrongfully and without cause breached the said contract theretofore entered into by him with the plaintiffs as evidenced by said telegrams and letters.

XII.

That by reason of said breach of said contract by the said defendant, plaintiffs have been damaged in

the sum of Twenty-one Thousand Dollars (\$21,000.00).

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of Twenty-one Thousand Dollars (\$21,000.00), and for costs of suit.

WALSH, NOLAN & SCALLON,
FREDERICK H. DRAKE,
Attorneys for Plaintiffs.

Exhibit "A"

REA BROTHERS

Live Stock Dealers

Billings, Mont.

THIS IS TO CERTIFY, That Story & Work of Bozeman, Mont., have this 28th day of April, 1917, bargained and sold to R. N. Stanfield or order, the following described Live Stock, and do hereby guarantee the title thereto, viz:

No. Head	Description	Brands	Price per Head	Time and Place of Delivery F. O. B. Cars.
About	7000 Head of yearling ewes		\$10.00	White Sulphur Springs and Three Forks, Mont., July 1st, 1917.
Any sick or cripple out not taken				
3600 Head now running near Logan balance near White Sulphur Springs.				

.....to weight.....pounds average or more.

Stock guaranteed to be in merchantable condition at time of delivery, and bought subject to Federal or State inspection.

Received in part payment for above mentioned stock
\$4,000.00.

(Signed) STORY & WORK

Per (L. P. W.)

R. N. STANFIELD by Wm. Rea, Jr.

(Witness)

Exhibit "B"

HOTEL PLACER

Maurice S. Weiss

Manager

Helena, Montana, May 27, 1917.

Mr. R. N. Stanfield,
Stanfield, Oregon.

Dear Senator:

As per wires exchanged I am enclosing you contract on the 7,000 Story & Work yearling ewes also check for \$7,000, advanced payment. I will deliver the ewes myself and when I do I will send you a draft for balance due you. Kindly sign contract where I have marked X. Keep one copy and return the other to me at Billings, Mont.

Hoping you are getting along fine and dandy, I remain

Yours truly,

W. R. Jr.

Exhibit "B-1"

REA BROTHERS

Live Stock Dealers

Billings, Mont.

Clear Range

BOOKED: Sheep Bought

THIS IS TO CERTIFY, That R. N. Stanfield of Stanfield, Oregon, have this 26th day of May, 1917, bargained and sold to Wm. Rea Jr. Agt. Billings, Mont. or order, the following described Live Stock, and do hereby guarantee the title thereto, viz:

No. Head	Description	Brands	Price per Cwt. Head	Time and Place of Delivery F. O. B. Cars.
About	7,000 Yearling Ewes, being same ewes bought from Story & Work of Bozeman, Mont.		\$11.60	White Sulphur Springs and Three Forks, Mont., July 1st, 1917.

.....to weigh.....pounds average or more.

Stock guaranteed to be in merchantable condition at time of delivery, and bought subject to Federal or State inspection. All sheep to be dry fleeces, and lambs separated from their mothers, and weighed twelve hours off feed and water at.....

Received in part payment for above mentioned stock \$7,000.

(Signed).....

(Witness).....

3600—3 Forks 3400 W. S. Spgs. Wm. Rea Jr. Agt.

Exhibit "B-2"

Bozeman, Mont. May 26th 1917 No.....
COMMERCIAL NATIONAL BANK 93-58
Pay to the order of R. N. Stanfield.....\$7000.00
Seven ThousandDollars.

Wm. Rea Jr.

Agt.

Collectable at par through the Federal
Reserve Bank of Minneapolis
Adv price 7000 ylng ewes.

United States of America,
District of Oregon,
County of Multnomah,—ss.

FREDERICK H. DRAKE, being first duly sworn upon oath, deposes and says: That I am one of the attorneys for the plaintiffs in the foregoing entitled action; that I have read the foregoing Amended Complaint and knows the contents thereof, and that the same is true as I verily believe.

That the reason this verification is made by deponent and not by plaintiffs is that plaintiffs are absent from the County of Multnomah, wherein deponent is and resides.

FREDERICK H. DRAKE.

Subscribed and sworn to before me this 14th day of June, 1920.

[Notarial Seal]

C. A. HILL,

Notary Public for the State of Oregon, Residing at
Portland, Oregon.

My commission expires October 15, 1923.

Due personal service of within Amended Complaint made and admitted and receipt of copy acknowledged this 15th day of June, 1920.

A. H. McCURTAIN of Attorneys for Def.

Endorsed. Title of Court and Cause. Amended complaint.

Filed June 21, 1920. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 5th day of August, 1920, there was duly filed in said Court, a Demurrer to Amended Complaint in words and figures as follows, to-wit:

In the District Court of the United States for the
District of Oregon.

T. B. STORY and L. P. WORK, Co-partners Doing
Business as STORY & WORK,

Plaintiffs,

vs.

R N. STANFIELD,

Defendant.

Demurrer to Amended Complaint

Now comes the defendant and demurs to the amended complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action against the defendant.

E. R. COULTER,

BAUER, GREENE & McCURTAIN,

Attorneys for Defendant.

[The following Exhibit is here inserted in this transcript in accordance with stipulation between respective counsel, which stipulation follows the exhibit. The original stipulation is on file herein.]

EXHIBIT "C"

"Stanfield, Oregon,

June 12th, 1917.

Wm. Rea, Jr., Billings, Mont.

Dear Sir:—Referring to your letter and telegrams concerning the Story & Work yearling ewes, you will note that I quoted you a price for immediate acceptance, and as I did not receive a reply, I concluded that you did not want them. The price on yearlings was steadily advancing, and I was unable to hold them for you at the price quoted. I am returning herewith your check for \$7,000.00 as I am unable to sell these ewes at the price offered in your contract.

Yours truly,

R. N. STANFIELD,

by Don Pruitt."

DP.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

(TITLE OF CAUSE.)

STIPULATION.

WHEREAS, in the above entitled cause in the Amended Complaint reference is made to a certain

letter bearing date June 12th, 1917, of which the following is a true copy:

(Copy of letter is here set forth)

And,

WHEREAS, said letter is referred to in said amended complaint and is made a part of the complaint as an exhibit and is designated in the complaint as Exhibit "C"; and,

WHEREAS, through oversight the said letter wasn't attached to said complaint, and in the transcript now on file in the Circuit Court of Appeals for the Ninth Circuit an omission of this letter occurs;

IT IS HEREBY STIPULATED and AGREED that the said letter marked Exhibit "C" may be made a portion of said transcript, and that a separate sheet may be printed containing said letter and inserted in said transcript, so marked so as to constitute a portion of the said complaint.

DATED January 31, 1921.

F. H. DRAKE,
WM. SCALLON,
C. B. NOLAN,

Attorneys for Plaintiffs in Error.

ED. R. COULTER,
BAUER, GREENE and McCURTAIN,
Attorneys for Defendant in Error.

I, Thos. G. Greene, one of defendant's attorneys, certify that in my opinion the foregoing demurrer to the amended complaint herein is well founded in law.

THOS. G. GREENE.

Portland, Oregon, July 30th, 1920.

State of Oregon,

County of Multnomah,—ss.

Due service of the within Demurrer is hereby accepted in said county thisday of July, 1920, by receiving a copy thereof, duly certified to as such by T. G. Greene of attorneys for defendant.

F. H. DRAKE,

of Attorneys for Plaintiffs.

Endorsed: Title of Court and Cause. Demurrer to Amended Complaint.

Filed August 5, 1920, G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 20th day of September, 1920, there was duly filed in said Court, an Opinion, in words and figures as follows, to-wit:

In the District Court of the United States, for the District of Oregon.

T. B. STORY, et al.,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Portland, Oregon, September 18th, 1920.

Memorandum by Bean, District Judge:

The demurrer to the complaint will be sustained.

It is elementary law that to constitute a contract there must be a meeting of the minds of the parties not only as to the subject matter but also as to the extent and character of the obligations assumed by each, and if the alleged contract consists of an offer by one party by mail or by telegraph, there must be an unconditional acceptance thereof by the other in accordance with the terms of the offer, and if any conditions are attached to the acceptance or it goes beyond the offer, no contract obligation arises. (*Glenn v. Birch & Sons Con.* 158 Pac. 834.)

Now the offer of the defendant contained in his wire of May 25th was not unconditionally accepted by Rae nor indeed was it accepted at all in terms. Rae does not say that he will take the sheep at the price quoted by the defendant but that he had sold them, presumably as the agent of the defendant. To whom the sale was made, the time of delivery and the terms of deferred payments not stated. Moreover his wire of acceptance if it can be so construed, was not unconditional but on its face showed that the transaction was not completed and would not be until the contract which he intended mailing to the defendant was executed.

It is true the complaint alleges that there existed in the livestock trade a well known custom and usage governing the terms of payment for stock where delivery was to be made in the future, but in the instance case it appears from the complaint that the plaintiff was endeavoring through Rae as his agent not to purchase stock belonging to the defendant, but defendant's

rights under a contract between him and plaintiff of date April 28th, and clearly the minds of the parties never met as to the terms and conditions of such purchase.

AND AFTERWARDS, to-wit, on Monday, the 20th day of September, 1920, the same being the 67th Judicial day of the Regular July term of said court; present the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

No. L.—8459.

T. B. STORY and L. P. WORK,

vs.

R. N. STANFIELD.

September 20, 1920.

This cause was heard by the Court upon the demurrer of defendant to the amended complaint herein, plaintiff appearing by Mr. Frederick H. Drake, of counsel, and defendant by Mr. E. R. Coulter and Mr. Thomas G. Greene, of counsel. Upon consideration whereof,

IT IS ORDERED THAT the demurrer to the amended complaint herein be and the same is hereby sustained.

AND AFTERWARDS, to-wit, on the 9th day of November, 1920, the same being the Judicial day of the Regular November term of said Court; present the Honorable Chas. E. Wolverton, United States Dis-

strict Judge, presiding, the following proceedings were had in said cause, to-wit:

In the United States District Court, District of
Oregon.

T. B. STORY AND L. P. WORK Co-partners, Doing
Business Under the Firm Name of STORY &
WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Order of Dismissal

This cause having heretofore come on regularly for hearing on demurrer to the amended complaint and thereafter an order having been duly entered herein on the 20th day of September, 1920, sustaining said demurrer; and plaintiffs having filed no further pleading herein although the time therefor has expired and it now appearing that plaintiffs have elected to stand on said demurrer to the amended complaint and decline to further plead, on motion of Thomas G. Greene of counsel for defendant, it is

ORDERED AND ADJUDGED that this action be dismissed and that defendant have judgment against plaintiffs for his costs and disbursements herein taxed at \$15.95.

CHAS. E. WOLVERTON, Judge.

Endorsed. Title of Cause. Judgment Order.

Filed and Entered November 9, 1920, G. H. Marsh,
Clerk.

AND AFTERWARDS, to-wit, on the 13th day of December, 1920, there was duly filed in said Court, Petition for Writ of Error in words and figures as follows, to-wit:

In the District Court of the United States, for the
District of Oregon.

T. B. STORY and L. P. WORK, Co-partners Doing
Business as STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Petition for Writ of Error

To the Honorable Robert S. Bean, Judge of the District Court aforesaid:

T. B. Story and L. P. Work, co-partners doing business as Story & Work, plaintiffs above named, feeling aggrieved by the judgment rendered and entered in the above entitled cause in the District Court of the United States for the District of Oregon on the 9 day of November, 1920, and complaining that in the record and proceedings had in said cause, and also in the rendition and entry of said judgment, manifest error has occurred to the great damage of the said plaintiffs, as more fully appears from the assignment of errors which is filed with this petition, come now and petition the above entitled Court for an order allowing said plaintiffs to prosecute a writ of error out of the United States Circuit Court of Appeals in and

for the Ninth Circuit, and that such writ of error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and for such other and further order as to the Court may seem meet

FREDERICK H. DRAKE,
C. B. NOLAN,
WM. SCALLON,
Attorneys for Plaintiffs.

Due personal service of within Petition for Writ of Error made and admitted and receipt of copy acknowledged this 13th day of December, 1920.

THOS. G. GREENE,
of Attorneys for Defendant.

Endorsed. Title of Court and Cause. Petition for Writ of Error.

Filed Dec. 13, 1920, G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 13th day of December, 1920, there was duly filed in said Court, Assignment of Errors, in words and figures as follows, to-wit:

In the District Court of the United States, for the
District of Oregon.

T. B. STORY and L. P. WORK, Co-partners Doing
Business as STORY & WORK,

Plaintiffs in Error,

vs.

R. N. STANFIELD,

Defendant in Error.

Assignment of Errors

Now come the plaintiffs in error, T. B. Story and L. P. Work, co-partners doing business as Story & Work, and, in connection with their petition for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit directed to the above entitled court, say that in the record, the proceedings and the final judgment made and entered in said cause on the 9th day of November, 1920, manifest errors have intervened to the prejudice of the plaintiffs in error, of which they make the following assignments, to-wit:

I.

The court erred in sustaining the demurrer interposed by the defendant to plaintiffs' amended complaint.

II.

The court erred in holding that the plaintiffs' amended complaint did not state a cause of action against the defendant.

III.

The court erred in ordering and entering judgment for the defendant.

WHEREFORE, plaintiffs in error pray that said judgment be reversed with directions that the cause be remanded to the United States District Court in and for the District of Oregon, with directions to reverse the said judgment and make an order overruling the demurrer to the plaintiff's complaint.

FREDERICK H. DRAKE,
C. B. NOLAN,
WM. SCALLON,

Attorneys for Plaintiffs in Error.

Due personal service of the foregoing Assignment of Errors made and admitted and receipt of copy thereof acknowledged this 13 day of December, 1920.

THOS. G. GREENE,
of Attorneys for Defendant in Error.

Endorsed. Title of Court and Cause. Assignment of Errors.

Filed December 13, 1920, G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on Tuesday, the 14th day of December, 1920, the same being the 36th Judicial day of the Regular November term of said Court; present the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

In the District Court of the United States for the
District of Oregon.

T. B. STORY and L. P. WORK, Co-partners Doing
Business as STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Order Allowing Writ of Error

On motion of Frederick H. Drake, C. B. Nolan, Esq., and Wm. Scallon, Esq., attorneys for plaintiffs herein,

IT IS HEREBY ORDERED that a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein, be, and the same is hereby allowed; that a certified transcript of the record and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, and that a citation issue in due course.

IT IS FURTHER ORDERED that the bond on error be fixed at the sum of Three Hundred Dollars (\$300.00).

Dated December 14, 1920.

R. S. BEAN, Judge.

Due personal service of within order allowing Writ of Error made and admitted and receipt of copy acknowledged this 14th day of December, 1920.

THOMAS S. GREENE,
of Attorneys for Defendant.

Endorsed. Title of Court and Cause. Order allowing Writ of Error.

Filed Dec. 14, 1920, G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 16th day of December, 1920, there was issued out of said Court a Writ of Error in words and figures, as follows, to-wit:

In the District Court of the United States for the
District of Oregon.

T. B. STORY and L. P. WORK, Co-partners doing
business as STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Writ of Error

United States of America,—ss.

The President of the United States of America, to the Honorable Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon, and to the District Court of the United States for the District of Oregon, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in said District Court, before you, between T. B. Story and L. P. Work, as Co-partners doing business as Story & Work, plaintiffs, and R. N. Stanfield defendant, manifest error hath occurred and happened to the said plaintiffs, T. B. Story and L. P. Work, as co-

partners doing business as Story & Work, as by their petition for a writ of error and assignment of errors appears, we being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco. in the State of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in said Circuit Court of Appeals, to be then and there held, that, the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States Supreme Court, this 16th day of December A. D. 1920, and of the Independence of the United States the one hundred and forty-fifth.

G. H. MARSH,
Clerk of the District Court of the United States, District of Oregon.

By F. S. BUCK, Chief Deputy.

Due personal service of the foregoing Whit of Error

made and admitted and receipt of copy acknowledged this 16th day of December, 1920.

THOS. G. GREENE,

By M. L. N.

of Attorneys for Defendant.

Service of above Writ of Error made this 16th day of December, 1920, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly certified copy of said Writ of Error.

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

Answer of Court to Writ of Error

The answer of the Honorable, the District Judge of the United States for the District of Oregon, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I hereby certify, under the seal of said District Court, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

Clerk.

AND AFTERWARDS, to-wit, on the 16th day of December, 1920, there was issued out of said Court, a Citation in words and figures, as follows, to-wit:

In the District Court of the United States for the
District of Oregon.

T. B. STORY and L. P. WORK, Co-partners doing
business as STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Citation

United States of America,—ss.

To R. N. Stanfield, defendant herein, and to Edward R. Coulter, Esq., and Messrs. Bauer, Green & McCurtain, his attorneys:

You are hereby notified that in a certain cause wherein T. B. Story and L. P. Work, Co-partners doing business as Story & Work are plaintiffs and R. N. Stanfield is defendant, pending in the District Court of the United States for the United States for the District of Oregon, a writ of error has been allowed and granted to said plaintiffs to the Circuit Court of Appeals of the United States for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Circuit Court of Appeals at the City of San Francisco, in the State of California, within said Ninth Circuit, thirty days after the date of this citation, to show cause, if any there be, pur-

suant to said writ of error, why the judgment made and entered in said cause in said District Court should not be corrected and speedy justice done the parties in that behalf.

Dated this 16th day of December A. D. 1920.

R. S. BEAN,

U. S. District Judge for the District of Oregon.

Due personal service of within Citation made and admitted and receipt of copy acknowledged this 16th day of December, 1920.

THOS. G. GREENE,

of Attorneys for Defendant.

Endorsed: Title of Court and Cause. Citation.

Filed Dec. 16, 1920, G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 16th day of December, 1920, there was duly filed in said Court, Bond on Writ of Error, in words and figures as follows, to-wit:

In the District Court of the United States for the
District of Oregon.

T. B. STORY and L. P. WORK, Co-partners doing
business as STORY & WORK,

Plaintiffs,

vs.

R. N. STANFIELD,

Defendant.

Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS,
That we, T. B. Story and L. P. Work, Co-partners doing business as Story and Work, as principals, and

FIDELITY & DEPOSIT COMPANY OF MARYLAND, as surety, are held and firmly bound unto R. N. Stanfield in the sum of Three Hundred Dollars (\$300.00), lawful money of the United States, to be paid to him and to his executors, administrators and successors, to which payment well and truly to be made we bind ourselves, jointly and severally, and each of our successors and assigns, firmly by these presents.

SEALED with our seals and dated this 15th day of December, 1920.

WHEREAS, the above named plaintiffs T. B. Story and L. P. Work, Co-partners doing business as Story & Work, are about to petition for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled case;

NOW, THEREFORE, the condition of this obligation is such that if the above named plaintiffs shall prosecute their writ to effect, and answer all costs, if they fail to make their plea good, then this obligation shall be void, otherwise to remain in full force and effect.

T. B. STORY,

L. P. WORK,

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,

By R. E. PINNEY,

Attorney in Fact.

The foregoing bond on error is hereby approved this 16th day of Dec., 1920.

R. S. BEAN, Judge.

Due personal service of within bond on writ of error made and admitted and receipt of copy acknowledged this 16th day of December, 1920.

THOS. G. GREENE,
of Attorneys for Defendant.

Endorsed: Title of Court and Cause. Bond on Writ of Error.

Filed Dec. 16, 1920, G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 16th day of December, 1920, there was duly filed in said Court, Praeipce for Transcript of Record, in words and figures as follows, to-wit:

In the District Court of the United States for the
District of Oregon.

T. B. STORY AND L. P. WORK, Co-partners doing
business as STORY & WORK,

Plaintiffs in Error,

vs.

R. N. STANFIELD,

Defendant in Error.

Praeipce for Transcript of Record

To Edward R. Coulter, Esq., and Messrs. Bauer, Green & McCurtain, attorneys for Defendant in Error, and to George H. Marsh, Esq., Clerk of said Court:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE That the undersigned, the attorneys for the plaintiffs in error above named, hereby serve

upon you, and each of you, this præcipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above entitled cause which said plaintiffs in error desire to and will incorporate in their transcript of record on writ of error herein, to-wit, the writ of error issued herein on the 16th day of December, 1920, to have judgment hereinbefore rendered and entered herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the Clerk of said District Court will incorporate and include in said transcript the following:

1. The judgment roll or final record in said cause consisting of the complaint, demurrer to complaint, motion, amended complaint and demurrer, to amended complaint, order for judgment, opinion and final judgment;
2. Petition for writ of error and order allowing same;
3. Assignment of errors filed with petition for writ of error;
4. Writ of error, and bond or error.
5. Citation on writ of error and acknowledgement of service by defendant in error.
6. Copy of this præcipe.

FREDERICK H. DRAKE,
C. B. NOLAN,
WM. SCALLON,
Attorneys for Plaintiffs in Error.

Due personal service of within Præcipe made and admitted and receipt of copy acknowledged this 16th day of December, 1920.

THOS. G. GREENE,

of Attorneys for Defendant.

Endorsed: Title of Court and Cause. Præcipe for Transcript of Record.

Filed Dec. 16, 1920, G. H. Marsh, Clerk.

**Certificate of Clerk U. S. District Court to
Transcript of Record**

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth District, that the foregoing volume, consisting of 34 pages, numbered consecutively from 1 to 34, inclusive, is a full, true and correct transcript of the record and all proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by the præcipe of the plaintiffs in error, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of

record amount to the sum of \$..... and have been paid by the plaintiffs in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Portland, Oregon, thisth day of January, 1921.

[Seal]

.....
Clerk.

No. 3103

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. STORY and L. P. WORK, Co-partners doing
business under the firm name and style
of STORY AND WORK,
Plaintiffs in Error,

vs.

R. N. STANFIELD,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

FREDERICK H. DRAKE,
C. B. NOLAN,
WM. SCALLON,
Attorneys for Plaintiffs in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

**T. B. STORY and L. P. WORK, Co-partners doing
business under the firm name and style
of STORY AND WORK,**
Plaintiffs in Error,
vs.
R. N. STANFIELD,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

Statement

The amended complaint in this case sets forth that Story & Work (the plaintiffs below and the plaintiffs in error here) were partners engaged in the livestock business and residing at Bozeman, Montana; that William Rea, Jr., was a livestock broker engaged in the business of buying and selling sheep on comission, known to be such to the plaintiffs and defendant, and that prior to May, 1917, in several transactions that took place covering a period of years, he purchased from and sold to the defendant Stanfield, who resided at

Stanfield, Oregon, several thousand head of sheep; that on the 28th day of April, 1917, the defendant Stanfield entered into a contract with the plaintiffs, through Rea as broker, for the sale of seven thousand head of yearling ewes belonging to the plaintiffs, delivery of which was to be made at White Sulphur Springs, Montana, and Three Forks, Montana, on July first, and on which a part payment of four thousand dollars (\$4,000.00) was made. The contract thus entered into is as follows:

“REA BROTHERS

Live Stock Dealers

Billings, Mont.

THIS IS TO CERTIFY, That Story & Work of Bozeman, Mont., have this 28th day of April, 1917, bargained and sold to R. N. Stanfield, Stanfield, Oregon, or order, the following described Live Stock, and do hereby guarantee the title thereto, viz:

No. head	Description	Brands	Price per Head	Time and Place of Delivery F. O. B. Cars.
About	7000 Head of yearling ewes		\$10.00	White Sulphur Springs and Three Forks, Mont. July 1st, 1917

Any sick or cripple out not taken.

3600 Head now running near Logan balance near White Sulphur Springs.

.....to weigh.....pounds average or more.

Stock guaranteed to be in merchantable condition at time of delivery, and bought subject to Federal or State inspection.

Received in part payment for above mentioned, stock, \$4,000.00.

(Signed) STORY & WORK,

Per (L. P. W.)

R. N. STANFIELD,

by Wm. Rea, Jr.

(Witness).....”

That thereafter, on the 25th day of May, 1917, the plaintiffs, desiring to repurchase from the defendant the ewes so sold, and desiring to purchase the defendant's rights in the contract above set forth, through Rea acting as broker, sent to the defendant at Stanfield from Billings the following telegram, to-wit:

“May 25th, 1917.

R. N. Stanfield,

Stanfield, Oregon.

Wire lowest price you will sell the Seven Thousand Story and Work yearling ewes.

(Signed) WM. REA, Jr.”

and meaning thereby, as the defendant knew, the ewes that were purchased from them; that in reply to this telegram, the defendant Stanfield, on the afternoon of the 26th, sent to Rea at Billings from Portland, Oregon, the following telegram:

“Portland, Ore., May 26th, 1917.

Wm. Rea,
Billings, Mont.

Lowest price on Story and Work yearling ewes Eleven fifty this subject to immediate acceptance.

(Signed) R. N. STANFIELD."

That this telegram was received on the afternoon of the 26th, that Rea had left Billings for Butte, and that the telegram was forwarded to him there, where it was received by him about eight o'clock in the evening of that day; and that immediately upon its receipt, he accepted for himself, and on behalf of the plaintiffs, the offer so made by then and there forwarding the following telegram:

"Butte, May 26, 1917.

R. N. Stanfield,
Stanfield, Oregon.

Sold your Story Work seven thousand yearling ewes eleven fifty. Mail you contract and check for seven thousand dollars tomorrow.

(Signed) WM. REA, Jr."

It is averred that this telegram was received by the defendant on the 26th. It is, likewise, averred that there was a well known custom that "immediate acceptance" in the offer that was made meant an acceptance within twenty-four hours, and that pursuant to this custom, the acceptance as declared by the telegram referred to was an immediate acceptance; that there was, likewise, a custom that where delivery was to be made in the

future, there should be paid of the purchase price (in the absence of an express agreement otherwise) a sum not to exceed eight per cent, payable in money or negotiable instruments, and that there was a custom, likewise, that in such transactions as the one under consideration where the services of a broker were utilized, the transaction could be carried on in the name of the broker without disclosing the principal's name; that pursuant to this custom and agreeable to the terms of the contract of sale, Rea, for and in behalf of the plaintiffs, sent by mail postage prepaid, on May 27th, a letter addressed to the defendant at Stanfield, Oregon, enclosing a check for \$7,000.00, and also sending a memorandum of the contract of sale. The letter and contract are as follows:

“HOTEL PLACER

Maurice S. Weiss,

Manager.

Helena, Montana, May 27, 1917.

Mr. R. N. Stanfield,

Stanfield, Oregon.

Dear Senator:—

As per wires exchanged I am enclosing you contract on the 7,000 Story & Work yearling ewes also check for \$7,000, advanced payment I will deliver the ewes myself and when I do will send you a draft for balance due you. Kindly sign contract where I have marked X. Keep one copy and return the other to me at Billings, Mont.

Hoping you are getting along fine and dandy, I remain

Yours truly,
W. R., Jr."

"REA BROTHERS Clear Range
Live Stock Dealers Booked: Sheep Bought
Billings, Mont.

THIS IS TO CERTIFY, That R. N. Stanfield of Stanfield, Oregon, have this 26th day of May, 1917, bargained and sold to Wm. Rea, Jr. Agt. Billings, Mont. or order, the following described Live Stock, and do hereby guarantee the title thereto, viz:

No. head	Description	Brands	Price Per Cwt. Head	Time and Place of Delivery F. O. B. Cars.
----------	-------------	--------	---------------------	--

About 7,000 Yearling	\$11.50 White Sulphur
Ewes being same	Springs and
ewes bought from	Three Forks,
Story & Work	Mont.
of Bozeman, Mont.	July 1st, 1917.

.....to weigh.....pounds average or more.

Stock guaranteed to be in merchantable condition at time of delivery, and bought subject to Federal or State inspection. All sheep to be dry fleeces, and lambs separated from their mothers, and weighed twelve hours off feed and water at.....

Received in part payment for above mentioned stock \$7,000.

(Signed) X.....

Wm. Rea, Jr. Agt.

(WITNESS).....

3600—3 Forks 3400 W. S. Spgs.” [Tr. p. 13.]

It is alleged that this letter and its contents was received in due course of mail, and, although thus received, Rea was not advised regarding it until the 12th day of June, when he received a letter from the defendant returning the check. This letter is as follows:

“Stanfield, Oregon.

June 12th, 1917.

Wm. Rea, Jr.,

Billings, Mont.

Dear Sir:—

Referring to your letter and telegrams concerning the Story & Work yearling ewes, you will note that I quoted you a price for immediate acceptance, and as I did not receive a reply I concluded that you did not want them. The price on yearlings was steadily advancing and I was unable to hold them for you at the price quoted.

I am returning herewith your check for \$7,000.00 as I am unable to sell these ewes at the price offered in your contract.

Yours truly,

R. N. STANFIELD,

by Don Pruitt.”

DP

The allegation is then made that the customs

and usages referred to heretofore were known to both parties, and that the dealings that were carried on, as evidenced by the telegrams and letters, were carried on agreeably to them, and that these customs were generally and universally observed in the case of the sale of sheep. A breach of the contract is then alleged with resulting damages amounting to \$21,000.00. [Amended Complaint, Tr. pp. 6-15.] To this amended complaint a general demurrer was interposed [Tr. p. 16], and sustained [Tr. pp. 17-19], and a judgment of dismissal of the action was ordered and entered. [Tr. p. 20.]

SPECIFICATION OF ERRORS

I.

The Court erred in sustaining the demurrer to the amended complaint.

II.

The Court erred in ordering and entering judgment for the defendant.

ARGUMENT

We quote as follows from the decision of the learned Judge who ruled on the demurrer:

“It is elementary law that to constitute a contract there must be a meeting of the minds of the parties not only as to the subject-matter but also as to the extent and character of the obligations assumed by each, and if the

alleged contract consists of an offer by one party by mail or by telegraph, there must be an unconditional acceptance thereof by the other in accordance with the terms of the offer, and if any conditions are attached to the acceptance or it goes beyond the offer, no contract obligation arises."

To the principles declared in the excerpt presented, we unqualifiedly assent, and in the instant case, unless we can fairly and fully meet its requirements, we feel that an affirmance of the judgment should be ordered. So that no misunderstanding may exist as to our position in this controversy, we desire at the outset to assert that the consideration of the telegrams by themselves alone cannot be sanctioned. With the telegrams, the contract for the sale of the sheep to Stanfield must be considered, and without this being done, important elements that enter into the contract are eliminated. The contract of April 28th, evidencing the sale of the ewes by the plaintiffs to the defendant, through Rea, is as essential to be considered as are the telegrams which relate to the offer that was made and the acceptance of it. Without recourse to that contract, the telegrams themselves would fall far short of making a contract.

What was the situation when the first of these telegrams was forwarded to the defendant by Rea? Rea was a broker engaged in the business of buying and selling sheep. On the 28th of April,

less than a month before the sending of the first telegram, Story & Work sold these ewes to the defendant, Mr. Rea representing the defendant in the transaction. The contract evidencing this sale appears in the transcript pages 12 and 13. This contract expressly sets forth the sale of these ewes, guarantees the title, names the number as about 7,000 head, fixes the price at \$10.00, specifies the time and place of delivery, and specifies, likewise, that about 3600 of the number were ranging near Logan, and the balance near White Sulphur Springs. The time of delivery was designated as the first of July, and the places of delivery were designated as White Sulphur Springs and Three Forks. This contract also contained an acknowledgment of payment of \$4,000.00 as part payment of these ewes. This contract is signed

“Story & Work
per (L. P. W.)”

“R. N. Stanfield,
by Wm. Rea, Jr.”

The title of the defendant to these ewes rests upon this contract. The other side will not contend that this is not an enforceable contract. As already stated, in less than a month after this contract was entered into, Rea, as a broker and acting for the plaintiffs, sent the first of the telegrams heretofore set forth to Stanfield, at Stanfield, Oregon, wanting him to wire the lowest price he would

sell the Story & Work yearling ewes for. When this telegram was sent, Stanfield knew what ewes were referred to. He knew, before the first of July. He knew that the amount that he would receive for these ewes could not be determined definitely until the first of July. He knew that when this count was made on the first of July, no animals that were sick or crippled could be counted. His profit on the deal meant to him \$1.50 per head. In the accounting that was to take place on the first of July, he would be charged on a basis of \$10.00 a head, and receive credit on a basis of \$11.50 a head on the two bands, aggregating about 7,000 head, less such number as should turn out to be sick or crippled. The defendant Stanfield, replying to this telegram the next day, telegraphed Rea:

“Lowest price on Story & Work yearling ewes eleven fifty. This subject to immediate acceptance.”

This telegram was sent from Portland, Oregon, and was received at Billings sometime in the afternoon of that day, and on the evening of that day from Butte, a reply telegram was sent as follows:

“Sold your Story Work seven thousand yearling ewes eleven fifty. Mail you contract and check for seven thousand dollars tomorrow.”

Some point is made on the fact that this reply telegram was sent to Stanfield rather than to Portland, from which place the telegram making the

offer was forwarded. This is a matter of no consequence in the controversy. The averment is made in the pleading that the telegram was received by the defendant on the 26th, and the only question that can arise then is, was the notification such as to comply with the requirements of the offer that the acceptance should be immediate? And this feature we will discuss at another time and place.

It is too obvious to need elaboration that the contract of April 28th entered into the negotiations and telegraphic correspondence that took place between Rea and Stanfield, and it is equally obvious that the provisions of that contract, whatever they were, became a part of the new contract that was entered into in so far as they were applicable. The plaintiffs knew, for instance, that the delivery of the ewes could not be made until July 1st. The defendant knew that he would not be compelled to make delivery before that time. Really, while the correspondence expressly provides for the sale of the ewes, the transaction in its true light meant that the rights in the contract then existing were transferred, the obligations of that contract to be determined definitely on the first of July. We insist then at the outset that the trial court should not only have considered the telegrams that passed between the parties, but should likewise have considered the contract that was entered into between them on the 28th of April.

Section 5031, Revised Codes of Montana.

Lyon v. Dailey Copper Co., et al., 46 Mont.
108, 126 Pac. 931.

As the contract under consideration was to be performed in the State of Montana, some of the Code provisions of that state have some bearing on the question we are now considering. We call attention particularly to the following sections of the Revised Codes of Montana, of 1907:

Section 5035 provides:

“A contract is to be interpreted according to the law and usage of the place where it is to be performed; * * *”.

Section 5036 provides:

“A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.”

Section 5032 provides:

“A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done, without violating the intention of the parties.”

What elements, may we inquire, are wanting to constitute a contract in the instant case? The subject-matter is not indefinite, the ewes are referred to as the Story & Work yearling ewes. There is no principle of law so well established as that which declares that a thing is certain which can be made certain. The defendant Stanfield certainly was not at sea as to what ewes were involved. As-

already stated, there was no uncertainty as to when delivery was to be made of the ewes and where. We submit that the only element in the contract that remained unsettled by the telegrams was the amount that should be paid in part payment before the first of July. The contract being silent on the matter and no custom prevailing in reference thereto, the time of payment would be when delivery of the ewes was made.

Section 5046, Revised Codes of Montana.

Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623.

We quote as follows from the latter case:

“Where one buys personal property at an agreed price, he, by implication of law, agrees to pay the price, and, if no time of payment is agreed upon, the law fixes the time of the delivery as the time of payment. * * * And if the time of delivery is postponed until the occurrence of some act to be done by the seller, the time of payment, if not otherwise provided for, will be postponed, by implication of law, to the time of such delivery. * * * This rule obviously applies to cases where the time of payment of part of the price is specifically fixed and the time of the payment of the remainder is left unprovided for.”

Gilfallan case, *supra*, page 625.

In the absence of an express agreement other-

wise providing, the ewes would be delivered within a reasonable time. Here, however, as the delivery was not to be made within that time, a custom prevailed that when the contract was entered into, part payment of the purchase price should be made. The averment is made in the complaint that this custom existed, and that part payment was made, pursuant to the requirement of that custom. It will be noticed that when the purchase was made by the defendant from the plaintiffs, part payment was made of the agreed purchase price. The custom referred to required that a certain percentage of the purchase price should be paid, and the complaint avers that this was done. When the defendant returned the check, the only reason assigned by him why he didn't consider that a contract had been entered into was that the offer made called for an immediate acceptance, and this requirement was not observed. Let us see how lacking in merit this contention is. The telegram containing the offer was received sometime in the afternoon of the 26th, and on that day, the reply was wired from Butte, and it is alleged that the reply was received by the defendant on that date. The cases unanimously hold that the delivery of the telegram to the telegraph company fixed the time when the contract was closed.

Ruling Case Law, Vol. 6, page 615;

Burton v. United States, 202 U. S. 344, 50 L.
Ed. 1057;

Wester et al. v. Casein Co. of America, 206
N. Y. 506, 100 N. E. 488;

Long v. Needham, 37 Mont. 418, 96 Pac. 731.

In the Wester-Casein case, *supra*, the Supreme Court of New York declares the rule in the following language:

“We are of the opinion as we have stated that the delivery of the cablegram to the telegraph company should be treated as a delivery to the plaintiffs. It is deemed to be a delivery to the plaintiffs, whether received by them or not, for the same reason that when one person, by letter or telegram, makes an offer to another, and the other person accepts such offer, either by post or telegraph, the contract springs into existence at the time of such mailing or sending, because of implied authority in the carrier of the message to receive the reply.”

See, likewise:

Garretson v. North Atchison Bank, 47 Fed.
867, affirmed in 51 Fed. 168;

Andrews v. Schreiber, 93 Fed. 367, affirmed
in 101 Fed. 763.

And as to the promptitude with which the telegram of acceptance was delivered to the company, we quote as follows from the decisions:

“Again, it is said the machine was not returned at once when found not to work well.

* * * The requirement that the binder be re-

turned 'at once' when found not to work well was complied with if returned to the place where received as soon as this, under the circumstances, could reasonably have been done. In *Reg. v. Rogers*, 3 Q. B. Div. 33, an agent is said to have remitted to his principal 'at once' if done within a reasonable time. 'At once' as used in such a contract, is synonymous with 'immediately,' 'forthwith', and 'as soon as possible,' which was usually construed to mean within such reasonable time as shall be required, under all the circumstances, for doing the particular thing. * * * In view of the distance the defendants lived from Cedar Rapids, and the surrounding circumstances, it was for the jury to say whether the machine was returned as soon as required by the terms of the warranty."

Warder, Bushnell etc. Co. v. Horne, 110 Iowa 285, 81 N. W. 591.

We submit on this proposition (if it assumes importance in the case—and the defendant concedes that it is the only proposition in the case, as shown by his letter) that the question as to whether the acceptance of the offer was immediate, in the light of the facts, was for the jury, and not for the court.

In the case of

Lucas v. Western Union Tel. Co., 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (New Series) 1016,

the Supreme Court of Iowa, considering this matter, spoke as follows:

“The plaintiff, then, did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 o'clock p. m. of the day after the letter had been received and the question arises whether this was ‘at once’ within the meaning of the offer which stated that another deal was pending. Like ‘forthwith’ and ‘immediately,’ ‘at once’ does not mean instantaneously but requires action to be taken within a reasonable time. In view of the particular circumstances of the case, or, as said in *Warder, Bushnell & Glessner Co. v. Horne*, 110 Iowa 285, 81 N. W. 591, it is synonymous with the words mentioned and ‘as soon as possible’, and is ‘usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing.’ It is doubtful whether the same vigilance should be exacted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. See *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775. The circumstances of each case necessarily have an important bearing. There was no evidence of the time a letter, if promptly mailed, might have reached

Sas. He had indicated in his letter that he was contemplating another deal, and we think ordinary minds fairly differ as to whether, in these circumstances, an acceptance 23 or 24 hours after the letter had been received was in time to bind the party making the offer, and the issue was for the jury to determine.”

In this connection, the fact must not be overlooked that the averment of the pleading is that the term “immediately” in the instant case, agreeable to custom and usage, meant an acceptance within twenty-four hours. This allegation stands uncontradicted, and, in the consideration of the demurrer, the court was required to accept this averment without qualification. If the case then is to stand on the proposition that there wasn’t an immediate acceptance of the offer, we respectfully submit that the defendant’s contention in this regard is entirely devoid of merit.

Mailing Contract

It is claimed that the averment in the telegram of acceptance that a contract accompanying a check should be mailed was an intention that no binding contract should exist until the contract so mailed was executed. This does not at all necessarily follow. It is true that where it appears that the contracting parties do not intend to be bound by a contract (even though the terms are

agreed on) until a formal contract is signed, until that signing occurs no binding contract exists.

Ambler v. Whipple et al., 20 Wall. 546, 22 L. Ed. 403.

It is equally true that where the terms of a contract are agreed on, the mere fact that the parties had in contemplation reducing that contract to writing would, in no manner, affect the binding force of the contract agreed on.

Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641.

In the case of

Mississippi & Dominion Steamship Co. v. Swift, 86 Maine 248, 41 Am. St. Rep. 545,

a rather exhaustive review of the cases is indulged in, and the conclusion of the court announced as follows:

“From these expressions of courts and jurists it is quite clear that after all the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attest-

ed by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

In determining which view is entertained in any particular case several circumstances may be helpful, as: whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

In the instant case, the telegrams and the sale contract of the ewes to the defendant left nothing for future determination. The instruments them-

selves combined constituted a written contract. What was omitted in the telegrams was included in the sale contract. There was nothing to indicate that the contract that was to be forwarded by Rea was to contain any new provisions or conditions. The offer made by the defendant's telegram demanding immediate acceptance precludes the possibility of the contention that the closing of the deal should be postponed until a formal contract was executed. No doubt, the formal contract was intended simply to subserve the purpose of having in one instrument the terms of the agreement. Indeed, the sending of the \$7,000.00 shows conclusively that the sending of the telegram accepting the offer left nothing for future consideration. We submit, then, that the sending of the contract, as stated in the telegram, does not, in any manner affect the contract which the sending of the telegram of acceptance closed.

The decisions are overwhelmingly with us in the contention we are now urging.

We cite for reference purposes, the following cases:

Sanders et al., v. Pottlitzer Bros. Fruit Co.,
144 N. Y. 209, 29 L. R. A. 431, and note;
Post v. Davis, 7 Kan. App. 217, 52 Pac. 903;
Rankin et al., v. Mitchem, 141 N. C. 277, 53
S. E. 854;

Brewer v. Horst-Lachmund Co., 127 Cal.
643, 60 Pac. 418, 50 L. R. A. 240;

Nash v. Kreling, 123 Cal. XVIII, 56 Pac. 260;

Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 87 Conn. 691, 89 Atl. 909;

United States v. J. P. Carlin Cont. Co., et al., (C. C. A, N. Y.), 224 Fed. 859;

Skeen v. Ellis et al., 105 Ark. 513, 152 S. W. 153;

Elks v. North State Life Ins. Co., 159 N. C. 619, 75 S. E. 808;

Grainger & Co. v. Louisville etc. Co., (Ky.), 116 S. W. 753;

Billings v. Wilby, 175 N. C. 571, 96 S. E. 50.

In the last case cited, the telegram of acceptance read as follows:

“Night letter received will accept send contract signed at once.”

The court said:

“On perusal of this evidence, we are clearly of opinion that a definite contract to let the work in question was constituted between these parties by the telegram of plaintiff, dated January 14th, in reply to defendant’s night letter and in terms, ‘Night letter received will accept send contract signed at once,’ and this result is not affected by the closing words of the message, ‘Send contract signed,’ etc.—this by correct interpretation meaning merely that it was the desire and preference of the plaintiff that the agreement they had made should be written out and formally signed by the parties, and it is the rec-

ognized position here and elsewhere that, when the parties have entered into a valid and binding agreement, the contract will not be avoided because of their intent and purpose to have the same more formally drawn up and executed, and which purpose was not carried out.”

In leaving this branch of the subject, we might incidentally remark that the defendant Stanfield did not request that a formal contract should be executed, and Rea’s mention of it does not make its execution indispensable to a completed contract. As already stated, a formal contract, entire in itself, as evidence of the contract entered into resting upon the telegrams and contract evidencing a sale of the ewes to the defendant, would be desirable. The original telegrams signed by the parties weren’t in their possession. The amount involved brought the transaction within the purview of the statute of frauds, and for this reason, if for no other, a contract evidenced by a single instrument was something that both parties would necessarily wish to possess.

Acceptance of Offer

It is contended that the words “Sold your Story & Work seven thousand yearling ewes” in the telegram, which we are designating as the telegram of acceptance, was not an acceptance at all. We submit that such refinement does not commend itself either for its reason or logic. Suppose that

Rea said, "Offer accepted. Sold your Story & Work seven thousand yearling ewes." Could any question be raised as to the meaning or sufficiency of such language? Are not the words used just as effective? Rea could not have sold the ewes without accepting the Stanfield offer, and he would not have transmitted the \$7,000.00 by mail if he did not think he had done so.

Section 5082, *supra*, provides that a contract must receive such interpretation as will make it operative, definite and capable of being carried into effect. Stanfield did not complain about his offer not being accepted. The only objection that he urged was that the offer wasn't accepted with sufficient promptitude.

Agency of Rea

Assuming now that the telegraphic correspondence constituted a contract, we insist that it matters little whether Rea was merely acting as agent for an undisclosed principal or whether he was acting for himself. In this instance, Stanfield could hold Rea or the principal at his election.

Vol. 2, Corpus Juris, Sections 505 and 526;
Cyc. Vol. 31, page 1564.

As a general rule, an undisclosed principal may enforce contracts made by an agent in his own name.

Vol. 2 Corpus Juris, Sections 555 and 557;
Cyc. Vol. 31, page 1555.

The rule, that may be stated to be of universal

application, is that in the case of making a contract where an agent contracts in his own name, and the contract is ostensibly made with the agent as principal, the principal may sue on such contract, subject, of course, to such defenses as the other party may have against the agent with whom the contract is made.

Section 5448, Revised Codes of Montana.

And so, likewise, the other contracting party may have recourse against the agent with whom the contract is made, or may have recourse against the undisclosed principal when the fact that there is an undisclosed principal is revealed.

See

Vol. 2 Corpus Juris, Agency, Sections 505, 526, 555 and 557, *supra*, and cases there cited.

Cyc. Vol. 31, pages 1555 and 1564, *supra*, and cases there cited.

Uncertainty as to Amount of Part Payment

In the telegrams that passed between the parties, nothing is said as to the time of payment. In the absence of any express agreement and any custom relating to the matter regarding the time of payment, payment would be made when transfer of the ewes was effected on July first. It is alleged, however, that there prevailed the custom, general in its nature, that when a contract was entered into, as in this case, part payment of the purchase price should be made, and that this custom

provided what the proportion should be. The amended complaint contains the averment that this part payment was made conformably to this custom.

It is needless to cite cases showing that custom and usage enter into contracts and become a part of them. The rule is succinctly stated in *Corpus Juris*, as follows:

“Valid usages concerning the subject-matter of a contract, of which the parties are chargeable with knowledge, are by implication incorporated therein, unless expressly or impliedly excluded by its terms, and are admissible to aid in its interpretation, not as tending in any respect or manner to contradict, add to, take from, or vary the contract, but upon the theory that the usage forms a part of the contract.”

Vol. 17 *Corpus Juris*, pages 492, 493 and 494.

Again, the same authority in regard to terms and prices announces the rule as follows:

“In like manner and for like reason evidence of usage on the question as to quantity, terms and price is admissible.”

Vol. 17 *Corpus Juris*, page 503.

Brent v. Charles H. Lilly Co., 202 Fed. 336;
Barrie v. Quimby, 206 Mass. 259, 92 N. E. 451;

Hayes v. Union Mercantile Co., 27 Mont. 264, 70 Pac. 975.

Upon the argument on the demurrer, it was suggested that the pleading is defective in not setting forth the custom and usage relied on. If such a defect existed, it would not be reached by a general demurrer, and in the instant case, we are dealing with a general demurrer. We respectfully insist, however, that the pleading is not vulnerable in the particulars stated. The averment of the pleading relating to this matter is as follows:

“Plaintiffs further aver that the customs and usages hereinbefore mentioned were known to plaintiffs and defendant and to the said Rea, and said dealings as evidenced by said telegrams and letters and as conducted by the said Rea for and in behalf of the plaintiffs, were carried on agreeably to said usages and customs, and that the same were generally and uniformly observed in the case of sales of livestock and particularly of sheep.”

It would be time spent profitlessly to discuss whether general usages should be pleaded. The rule seems to be well founded that this is not necessary.

12 Cyc, 1097.

17 Corpus Juris, page 516.

So, likewise, where a local custom is incidental to an implied contract and relied on as evidence of some fact in issue, it is not necessary to plead same.

Sherwood v. Home Savings Bank, 131 Iowa
528, 109 N. W. 9.

Where, however, a local custom is relied on, as entering into a contract and forming part of same, it must be pleaded.

Harrison v. Birrell, 58 Ore. 410, 115 Pac.
141.

In the instant case, the usages relied on are pleaded, and the sufficiency of such pleading is determined by requirements which are specifically set forth in the following excerpt from *Corpus Juris*:

Where it becomes necessary to plead a custom or usage, all the essentials requisite to its validity and binding effect must be averred. Hence the pleading should either aver knowledge on the part of the person to be charged or allege facts authorizing the conclusion that it was of such general notoriety that he will be presumed to have knowledge."

Vol. 17 *Corpus Juris*, page 518.

Tested by this standard, we submit that the averments of the pleading adequately meet the test. We say that the customs and usages set forth were known to the plaintiffs, defendant and Rea; that they were generally and universally observed in transactions of the kind under consideration.

While no principle of estoppel may be successfully invoked, the defendant in this case is placed in a not too favorable light by the correspondence

carried on. Advised on the 26th that the offer made by him was accepted, and having in his possession the contract and check probably not later than the 28th of May, he preserved for the period of two weeks an ominous silence, If the market went up, he would return the letter and check, which he did. If it went down, he would keep the check, and consider the contract a binding one. The court should not look too favorably on the many technical grounds which are now urged, in the light of the fact that the only objection that the defendant urged himself was that the notification of the acceptance of the offer was not prompt enough. In the light of the authorities which have been submitted, we insist that this ground is untenable, and insist, likewise, that should there be any question as to whether the notification of acceptance of the offer was sufficiently prompt, it presented a question of fact for submission to the jury rather than a question of law to be disposed of summarily by the court.

The learned trial court was in error in sustaining the demurrer to the complaint, and the judgment entered accordingly, we respectfully submit, should be reversed.

Respectfully submitted,
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8533
No.

United States
Circuit Court of Appeals
for the Ninth Circuit

T. B. STORY and L. P. WORK, Co-partners doing
business under the firm name and style
of STORY AND WORK

Plaintiffs in Error,

vs.

R. N. STANFIELD

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

BAUER, GREENE & McCURTAIN,

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Attorneys for Defendant in Error.

FILED
FEB 15 1908

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Statement

Stripped of all surplusage of language the amended complaint in this action attempts to allege that there was a contract for the sale by defendant in error to the plaintiffs in error of seven thousand yearling ewes; that the defendant in error broke the contract and as a result the plaintiffs in error were damaged in the sum alleged in the complaint.

The alleged contract in question consisted of a series of letters and telegrams exchanged between the defendant in error and one William Rea, Jr., the agent of the plaintiffs in error. These telegrams and records

are found in the amended complaint (Record 6-16).

To this amended complaint defendant in error entered a demurrer. This demurrer was by the Court sustained. In his memorandum opinion sustaining this demurrer Judge Bean said:

“The demurrer to the complaint will be sustained.

“It is elementary law that to constitute a contract there must be a meeting of the minds of the parties not only as to the subject matter but also as to the extent and character of the obligations assumed by each, and if the alleged contract consists of an offer by one party by mail or by telegraph, there must be an unconditional acceptance thereof by the other in accordance with the terms of the offer, and if any conditions are attached to the acceptance or it goes beyond the offer, no contract obligation arises. (Glenn v. Birch & Sons Con. 158 Pac. 834).

“Now the offer of the defendant contained in his wire of May 25th was not unconditionally accepted by Rae nor indeed was it accepted at all in terms. Rae does not say that he will take the sheep at the price quoted by the defendant but that he had sold them, presumably as the agent of the defendant. To whom the sale was made, the time of delivery and the terms of deferred payments not stated. Moreover his wire of acceptance if it can be so construed, was not unconditional but on its face showed that the transaction was not completed and would not be until the contract which he intended mailing to the defendant was executed.

“It is true the complaint alleges that there existed in the live stock trade a well known custom and usage governing the terms of payment for stock where delivery was to be made in the future, but in the instance case it appears from the complaint that the plaintiff was endeavoring through Rea as his agent, not to purchase stock belonging to the defendant, but the de-

defendant's rights under a contract between him and plaintiff of date April 28th, and clearly the minds of the parties never met as to the terms and conditions of such purchase."

Argument

The point raised by the demurrer of the defendant in error is that these communications do not constitute a contract between the parties. In other words there was no meeting of the minds necessary to constitute a contract. It is an elementary principle that it is essential to a contract for the sale of chattels like other contracts that there must be a meeting of the minds and an agreement by both of the parties to all of the terms of the sale.

In the instance case, at most, all that can be said, is that there was a meeting of the minds upon the price to be paid for the animals. There was no meeting of the minds as to the amount of cash payment, if any, nor as to when the remainder should be paid.

In paragraph VIII of the complaint, in which they attempt to allege a custom as to the payment of the advance portion of the price, the plaintiffs do not fix any definite sum. They say, "there should be paid to the seller part of the purchase price not exceeding eight per cent of the estimated total price unless otherwise agreed upon." The very language used shows that there is no definite, certain, fixed, universal custom as to the exact amount of the advance to be paid. This allegation further shows that it is always a mat-

ter of contractual agreement. Eight per cent of the price of seven thousand yearling ewes at \$11.50 per head would be \$6440.00, yet the plaintiffs assumed under their alleged custom to mail check to defendant for \$7,000.

There was no meeting of the minds upon the question of date of delivery, the condition of the sheep at the time of delivery, nor the place of delivery.

William Rae and the plaintiffs evidently recognized that these telegrams did not constitute a contract because in Rae's second telegram to Stanfield, which by the way was sent to Stanfield, Oregon, at a time when Stanfield's telegram showed he was in Portland, Oregon, Rea said: "Sold Story and Work seven thousand yearling ewes for \$11.50. *Mail you contract and check for \$7,000 tomorrow.*"

Even had Stanfield in his telegram not only stated price but the date of delivery, terms of payment, etc., this reply telegram of William Rea would not have constituted an unconditional acceptance of Stanfield's offer. At most, all that could be said of Rea's second telegram would be that the offer was accepted subject to the conditions and terms contained in a contract which Rea was sending to Stanfield. Stanfield, until he received this contract and signed the same and agreed to its terms, could not hold Rea. By the same reasoning neither Rea nor his principal could hold Stanfield until Stanfield had agreed to the terms of the condition upon which Rea accepted Stanfield's offer,

provided the offer had contained and embodied therein all the essentials necessary to constitute a contract. We, of course, maintain that the telegram from Stanfield was insufficient for this purpose.

The law is well settled that in order to constitute a binding contract all the terms the parties had in contemplation must be agreed upon.

Brophy v. Idaho P. & P. Co., 31 Mont. 279.

Monahan v. Allen, 47 Mont. 75, 130 P. 768.

Gill Mfg. Co. v. Hurd, 18 Fed. 673.

One question to determine is whether the terms in the instance case were agreed upon.

If it is said that the law would construe the negotiations as meaning that delivery and payment should be concurrently, and both be within a reasonable time, we answer that such rule cannot apply to this case because R. N. Stanfield knew he had not possession of the sheep or the right to possession until July 1st, 1917. That Stanfield must have, and did, contemplate, further negotiations and settlement of terms is shown by his telegram.

In Monahan v. Allen, 47 Mont. 75, it was held that an offer to buy land "\$5000 cash and remainder to be paid in such terms and agreements as may hereafter be made," and accepted on such terms was too vague, indefinite and uncertain as to form the basis for a contract.

Monahan v. Allen, 47 Mont. 75, 130 Pac. 768 (1913).

The court, in the above case, quotes from Section 27, Page on Contracts, thus:

“an offer, even if intended to create legal relations, must be so complete that, upon acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not.”

The court says, further:

“If then, the offer is indefinite, and material terms are left for future negotiations, the acceptance, which must correspond with the offer cannot aid it.”

“In *Long v. Needham*, 37 Mont. 408, 96 Pac. 731, this court stated the rule as follows: ‘An agreement to be finally settled must comprise all the terms which the parties intend to introduce. An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement until the terms of that agreement are settled.’ ”

“That Allen’s offer and Monahan’s acceptance of it did not conclude the negotiations was thoroughly understood by both parties. The writing, on its face, provides for further treaty arrangements, and some of these negotiations were subsequently carried on.”

Monahan v. Allen, 47 Mont. 75.

If we substitute the word “Stanfield” for Allen and “Rea” for Monahan, we have the case at bar. If Stanfield had sued Rea for failure to accept the ewes and pay the purchase price, the answer of Rea in court that there was no contract for the reason that the terms had not been agreed upon and that Stanfield was unable to deliver until after July 1st would have absolved Rea from liability. If one party is not bound, the other is

not;—there must be mutuality.

A contract is not made so long as, in the contemplation of both parties thereto, something remains to be done to establish contract relations; the law not making a contract when the parties intend none, and not regarding an arrangement as completed which they regard as incomplete.

Central Bitulithic Paving Co., v. Village of Highland Park, 129 N. W. 46, 17 Detroit Leg. N. 1078.

The offer must be one which is of itself intended to create legal relations on acceptance and the offer intended to create legal relations must be so complete that on acceptance an agreement *containing all the necessary terms is formed*.

Elks v. North State Life Ins. Co., 75 S. E. 808 (N. C.)

A contract is not complete by proposition and acceptance thereof, by correspondence, where essential matters affecting the rights of the parties are left open for further consideration.

Brown v. New York Cent. R. Co., 44 N. Y. 79.

No contract ought to be held established if it is clear upon the facts that there were other conditions of an intended contract beyond and besides those expressed in the letters, and without the settlement of which the parties had no idea of concluding any agreement.

Hussey v. Horne-Payne, 4 App. Cas. 311, 48 L. J.

Ch. 846, 41 L. T. N. S. 1, 27, Week. Rep. 585.

Although the mere fact that the agreement is to be reduced to writing will not prevent a contract from arising, this statement is subject to the provision that all the terms of the contract contemplated by the parties have been agreed upon.

Long v. Needham, 37 Mont. 408, 96 Pac. 731.

For such general statements of the law see:

Ann. Cas. 1912. B., 130 (note).

Where an agreement was to be reduced to writing, and there is no evidence from which its exact terms could be inferred, it will be presumed that the parties understood that there was to be no contract until the terms were reduced to writing. *Methudy v. Ross*, 81 Mo. 481.

Mere acceptance of a proposal to do certain work does not create a contract between the parties, where neither the offer nor the acceptance settle certain necessary details, and where the parties, at the time the acceptance is given, agree to thereafter make a written contract embodying the still unsettled details.

Jersey City Water Com'rs v. Brown, 32 N. J. Law (3 Vroom) 504.

If the negotiations only cover part of the terms to be settled by the contract, and the understanding is that the other terms shall be settled and put into a formal contract, and those terms cannot afterwards be agreed upon, there will be no enforceable contract between the parties.

Connery v. Best, 1 Cab. & El. 291.

Where it was agreed, after arranging the terms of the proposed contract, that the contract should be reduced to writing, and signed by the parties, and afterwards some of the parties refused to sign the writing, on the ground that it included matters not agreed on, it shows that the minds of the parties did not meet.

Brvant v. Ondrak, 87 Hun., 477, 34 N. Y. Supp. 384.

Where some of the material features of the contract are left to future agreement to be incorporated in a writing, there is no contract.

Cincinnati Equipment Co. v. Coal Co., 164 S. W.
794 (Ky.)

The negotiations were not complete and were not such as the law can imply. As above shown the law could not imply payment and delivery and the other terms in this case because Stanfield knew he had no sheep to deliver until July 1st, and contemplated further negotiations and Rea also contemplated further negotiations. Further Stanfield did not know but what Rea, or his undisclosed principal would demand delivery at a date later than July 1 and at some other place than White Sulphur and Three Forks.. If, in addition to the above it is shown, as here, that the parties intended to have the agreement reduced to writing and the negotiations settled in that manner, we submit there is no contract.

The acceptance is conditional, in that it refers to and makes the acceptance conditional upon the contract mailed.

This fact alone is sufficient to show that there was no meeting of minds and hence no contract.

In Runyon v. Wilkinson Gaddis & Co., a New Jersey case, reported in 31 Atl. 390, the proposing purchaser cabled: "accept 370; half cash, half debentures. *Contract mailed.*" "It was conceded that the terms were settled and that the telegram would have been an acceptance if it had not referred to "contract mailed," which contract, as in the case at bar, contained additional terms not included in the offer.

The court, in its opinion, says of the above mes-

sage:

"It is upon this message, read in connection with the previous letters, that *plaintiff in error now contends that he ought to have been permitted to go to the jury* upon the question whether or not a completed contract of sale did not arise therefrom. *But this contention rests upon an inadmissible construction of the cablegram. It was not an unqualified acceptance of the offer of sale.* On the contrary, *it was qualified by the connection of the acceptance with the contract which it stated had been mailed.* It was an acceptance according to the contents of that contract. Such was the construction given to the message by the trial judge, and in that there was no error." (Italics ours.)

Runyon v. Wilkinson Gaddis & Co., 31 Atl., 390, (1895).

In Long v. Needham, 37 Mont. 408, 96 Pac. 731, the offer was definite in terms and provided that the papers should be placed in escrow. The acceptance was in these words: "Offer accepted, will send papers to Fergus County Bank for signature." This was held to be an acceptance, the terms being agreed upon. The court says on page 417:

"If Needham's telegram, (the one above set out) had referred to a letter which was to follow, Long would then have been put upon notice that he must await the arrival of such letter and would be bound by it."

The court then cites the New Jersey case above.

Stanfield, by Rea's telegram, was notified that a contract was coming and that the acceptance was conditioned on Stanfield's agreeing to the terms of the contract which were different and additional to those con-

tained in the telegram. A complete answer by Rea, or Story & Work, to a suit against him, or them, by Stanfield, or his assigns, would be that the acceptance was conditional, that Rea distinctly notified Stanfield by the telegram that a contract was submitted containing the terms on which Rea would accept the offer, and that there was no contract until those terms had been consented to. A contract must be mutual, and if Rea or Story & Work are not bound, Stanfield is not bound.

In their brief counsel for plaintiff in error lay great stress on the fact that in his letter to Rea defendant in error bases his refusal upon the ground of failure to immediately accept. This argument is not sound and does not by interpretation make certain what never was certain. It does not accomplish a meeting of the minds on all the terms of the proposed contract.

Other cases in point follow:

Although the letter states that the writer has agreed to the proposition, yet there will be no contract if the letter also states that a contract is to be executed.

Wood v. Edwards, 19 Johns 212.

A letter stating, "*We accept*" the offer "*and now hand you two copies of the conditions of sale which we have signed; we will thank you to sign them and return one of the copies to us,*"—will not constitute a contract until the copies are signed. (*Italics ours*).

Crossley v. Maycock, L. R. 18 Eq. 180, 43 L. J. Ch. 379, 22 Week., Rep. 387.

Acceptance of an offer does not show a meeting of the minds of the parties where the party ac-

cepting the offer, on the subsequent presentation of a written contract for him to sign, containing the terms of the offer, made certain alterations therein which the other party refused to accept. *Kirwan v. Byrne* (Com. Pl.) 9 Misc. Rep. 76, 29 N. Y. Supp. 287.

Where B telegraphed in answer to A's offer: "*Have written you;* will take land at your figures. Answer." The telegram refers to the letter as containing the acceptance, and is not in itself an unconditional acceptance.

Baker v. Holt, 14 N. W. 8 (Wis.).

A contract for the sale of goods was not complete where there was an offer to buy at a given price, which was answered substantially in these terms; "Will accept. Reasonable time for delivery. Please name limit,"—no limit being at any time named, so far as appears.

Decker et al v. Gwinn et al, 20 S. E. 240.

That this is the law on the subject is shown by the above cases. In case of *Cornish v. Woolverton*, 32 Mont. 456, the court says:

"Section 2207 (now section 5031) of the Civil Code provides: 'Several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together.' Under the rule of construction here declared, the conditions and stipulations embodied in the one must be construed to enter into and constitute a part of the other. *So that, if the mortgage referred to in the note contains conditions which render the note uncertain as to the amount to be paid and the time of payment, these must be read into the note.* The two must be read and con-

strued together to *ascertain the nature of the agreement* upon which the negotiable character of the note depends. The reference to the mortgage *brings to the notice of everyone dealing with the note all the conditions attached*, so that even though it should be held negotiable so far as concerns the conditions expressed upon its face, its negotiable character must be determined by the provisions of the mortgage. This section of the statute sets at rest any question which might otherwise exist as to the rule of construction applicable. *The note and mortgage refer to each other. They are contracts relating to the same subject matter. They are between the same parties. They are both parts of substantially one transaction.* Therefore they constitute one contract. (Meyer v. Weber et al, 133 Cal. 681, 65 Pac. 1110.)"—The italics are ours.

The court was speaking of contracts. We believe there was no contract in the case at bar, but the language is applicable to the negotiations in the present case.

The telegram referred to a contract to be sent. Stanfield could not assent to that contract, and the terms therein contained, until he received that contract. There could be no contract until Stanfield communicated his assent to those terms to Rea. The alleged acceptance was conditional in even referring to a contract to be sent which might, or might not, but which did, contain terms inconsistent with the offer.

The alleged acceptance is conditional *and* ambiguous.

Stanfield did not appoint Rea his agent. He made the alleged offer of sale to Rea. In addition to referring to a contract and making his acceptance conditional on the terms therein contained, Rea fails to "accept" the offer, or to use any language equivalent to an acceptance. He says: "**Sold** your Story-Work seven thousand ewes." Rea failed to do the act called for by the alleged offer. The alleged offer called for an acceptance. An acceptance must be communicated. It is elementary that an offer calling for a promise cannot be accepted by doing an act instead.

By dealing in the manner he did with the property Rea rejected the offer.

The case of *Martin v. Northwestern Fuel Co.* 22 Fed. 596 is in point on this question.

In that case in reply to a proposition made by the plaintiff by telegraph to sell coal at a certain figure, the following telegram was sent: "Telegram received. *You can consider the coal sold* Will be in Cleveland next week and arrange particulars." Judge Brewer, in writing the decision, said that the expression, "you may consider the coal sold," was not a natural one when a definite acceptance of an offer was intended, but was merely an acknowledgment that a contract might be easily agreed upon.

Martin v. Northwestern Fuel Co. 22 Fed. 596.

A letter in reply to an offer to sell land on certain terms, in the following words: "Have twice attempted the tender of the first payment of \$500 upon the agreement made between us

on the 7th December last. I will meet you," etc., "when I shall be ready to make tender of the money, and execute the proper agreements there-upon" does not constitute an acceptance of the offer.

Potts v. Whitehead, 23 N. J. Eq. (8 E. Green) 512.

A offered his farm to B at a certain price. B wrote: "I have concluded to purchase the farm at your price," naming it. B replied by letter accepting the alleged offer. Held there was no binding contract, since the letter was not an acceptance.

If the bargain was already made, as the answer assumes, why send a contract containing different and additional terms and why consider the contract so important that reference thereto must be made in the telegram?

In this connection, we cannot emphasize too strongly that a contract must be mutual and that there would be no chance in the world for Stanfield to hold Rea as on a binding contract under the negotiations in this case.

Rea would answer that he intended delivery at once, and Stanfield would have to say he intended delivery July 1st. There was hence no meeting of minds on one of the material terms.

Rea would say: I conditioned my acceptance on the condition in the contract I referred to and made a part of my acceptance by wire, and the courts would say that the telegram referred to the contract which was to follow and conveyed the information that the ac-

ceptance was conditional on the execution of it according to the different and additional terms therein contained. We submit that Rea would not have been bound and that Stanfield should not be held to be. If Rea would not have been bound Story & Work would not be bound, and Stanfield should not be held to be bound.

In *Uttey v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54, where the offer was made and accepted, by wire, unconditionally, and the subject matter delivered the same day, the court held that a qualification in a letter received four days later was ineffective to change the contract, the court saying, "If the defendants intended to qualify, it should have been done in the despatch."

This is just the method Rea adopted to make his acceptance conditional and qualified. This gave Stanfield notice that Rea had not accepted the offer as made, that Rea was sending a contract which contained the terms on which he would buy.

The case of *Long v. Needham*, 37 Mont. 408, is in accord with *Uttey v. Donaldson*, supra, in holding that the defendant could not on the following day vary the terms theretofore agreed upon by telegrams and letters.

In *Uttey v. Donaldson*, supra, the supreme court of the United States says, "If the defendant intended to qualify, it should have been done in the despatch." In *Long v. Needham*, supra, the Montana court says if the telegram had referred to a letter the acceptance would

have been qualified.

Long v. Needham decided that where the minds of the parties had *fully met* in letters and telegrams between them, and the acceptance was *not conditional* and *did not refer* to any written contract, an enforceable contract was made even though they may have contemplated that their views should afterward be reduced to a more formal writing.

Wm. Rea inquired as to the price and the offer was sent to him. Nothing was said to show he was an agent. Wm. Rea purports to accept. Can one to whom the offer was not made step in and say to Stanfield, "You made the contract with me."

In Glenn v. S. Birch & Sons Construction Co., 52 Montana, 414, the same question arose. In that case it seems that the defendant had some notice that the sale of the bonds was to be made to a trust company and the plaintiff requested that defendant make out the contract to the trust company.

The plaintiff refers to his commissions in his final letter set out on page 418 of the opinion.

The court in holding that there was no contract, says:

"Its proposition was to sell to plaintiff not to another person. The negotiations had been made with him. It had had an opportunity to satisfy itself that he was a suitable person to establish contract relations with. This was one thing. It was quite another for the plaintiff to couple with his acceptance a proposal

that defendant should enter contract relations with a third party, about which it ostensibly had no knowledge, under stipulations and conditions not disclosed to defendant until it had received plaintiff's letter of October 9, containing full information as to the obligations defendant was to assume toward the obligee, substituted by plaintiff in his stead. If it be conceded that the German American Trust Company had been mentioned by plaintiff to the agent of defendant during his visit to Great Falls early in October, as is intimated in the letter of October 9, there is nothing in the complaint disclosing what was said or what, if any, understanding was reached at that time."

It does not appear whether the agency doctrine of undisclosed principal was presented to the court in the above case and we are not going into this any further, for it is plain that if there was no contract with Rea, as we think we have shown in this brief, there could be no contract with Story & Work, or any one else.

There is one further point we will mention briefly. The alleged offer was sent from Portland, Oregon. Wm. Rea sent his wire purporting to accept to Stanfield, Oregon. We think that the dating of the offer at Portland was sufficient notice to Rea to send an acceptance to Portland, especially so, as the offer says, "subject to immediate acceptance." The offer was sent from Portland to Billings, the place from which the inquiry came and forwarded to Butte, where Rea

then was. Rea purported to accept by wiring to Stanfield, Oregon. The offer certainly contained an implied term that the acceptance should be sent to Portland. The telegram was not delivered until after Stanfield sold the sheep.

The same state of facts was presented to the Supreme Court of the United States in *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225, 4 L. Ed. 556.

A offered to purchase flour from B at Mill Creek, to be delivered at Georgetown, and sent the letter by wagon from Harper's Ferry, near which place he then was, saying, "Please write by return of wagon whether you accept our offer." B sent the acceptance to A's place of business at Georgetown, where A actually received it. There was held to be no contract because of failure to comply with the terms of the offer as to place of acceptance, the court saying:

"It is an undeniable principal of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either. . . . Whatever uncertainty there might have been as to the time when the answer would be received there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place,

therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer."

Eliason v. Henshaw, 17 U. S. (4 Wheat.) 225, 4 L. Ed. 556.

As a matter of fact, due to the alleged offer having been delayed in delivery to Rea by his departure from Billings after he sent the inquiry, and due to the fact that the alleged acceptance was deposited with the telegraph company in the night time and was addressed not to Portland but to the town of Stanfield, R. N. Stanfield did not receive the same until several days after the alleged offer was sent and not until after he had disposed of the ewes.

Custom Cannot be Resorted to for the Purpose of Creating a Contract.

In the first place usage or custom is not properly pleaded in the complaint.

A party who relies on a local custom forming part of a contract must plead the custom so explicitly that it will appear not only that the custom existed but that both parties had knowledge of it at the time of making the contract, and *that they contracted with reference thereto.*

Staroske v. Pulitzer Pub. Co., 138 S. W. 36 (Mo. 1911).

Where plaintiff pleaded that "in accordance with the

custom of the trade," in *Poland v. Hollander*, the court said:

"The allegation as to custom of trade in this instance does not save the pleading because there is no averment that the custom is general or uniform, or that it existed for a sufficient length of time to bind the defendants, or that the defendants dealt with a knowledge, or that it was definite and certain as to the exact amount of advance payment which should be made."

If the contention of plaintiff in error is correct, then under this alleged custom plaintiff in error would have had the option of making any advance payment he might desire from one cent per head to eight per cent of the contract price. On the face of the pleading the alleged custom is no custom. There is nothing definite, fixed or certain about it.

The Supreme Court of Oregon in the case of *Oregon Co. v. Elmore Packing Co.*, 138 Pac. 862, in speaking of this, said:

"The only evidence offered by the plaintiffs on that point was that of three witnesses, to the purport that there was a general usage on Tillamock Bay that fishermen delivering fish to any cannery were in the employ of such cannery or packing company. It will be remembered that no plea of custom or usage appears in the complaint. If one would rely upon a custom, he should plead the same and not only so, but should state that the custom was known to the party to be affected by the same, or should allege facts authorizing the conclusion that it was of such general notoriety that the other party would be presumed to have knowl-

edge of the usage.

"Moreover, it is laid down in section 727, L. O. L., that evidence may be given of 'usage, to explain the true character of an act, contract or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation. It thus appears that custom is to be used in evidence only as a means of interpretation of a contract, and not for the purpose of proving the agreement itself. The consequence is that if nothing but custom be shown, there is no proof of a contract arising between the two parties. *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705; *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69, 10 Ann. Cas. 1065; *Barnard v. Houser*, 137 Pac. 227. The circuit court was in error in refusing to take from the jury the evidence of custom alluded to."

If one would rely upon a custom he should plead the same, and not only so, but should state that the custom was known to the party to be affected by the same, or should allege facts authorizing the conclusion that it was of such general notoriety that the other party would be presumed to have knowledge of the usage.

Oregon Fisheries Co. v. Elmore Pkg. Co., 138 Pac. 862.

A custom is binding only when it is of such universal practice as to justify the conclusion that it became by implication, a part of the contract.

Maddox v. Washburn-Crosby, 69 S. E. 821 (Ga.).

But even if custom was properly pleaded, we believe we have shown that no contract was created, and hence custom has no place in this case.

As was said by the Supreme Court of the United

States in *Thompson v. Thompson*, 18 Law Ed. 704, 707, "Where there is no contract, usage will not make one"

This is so well settled as to need but little discussion.

In the case of *Tilley v. City of Chi. & Co. of Cook*, 26 L. Ed. 374, the court said:

"Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. *Hutchinson v. Tatham*, L.R., 8 C. P., 482, *Field v. Lelean*, 30 L. F. exch. 168, *Bywater v. Richardson*, 1 Ad. & E., 508; *Robinson v. U. S.*, 13 Wall., 363 (80 U. S., XX., 653.)"

"In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract. *Holding v. Pigott*, 7 Bing., 465, 474; *Clarke v. Roystone*, 13 Mees. & W. 752; *Yeata v. Pim*, Holt, N. P., 95; *Trueman v. Loder*, 11 Ad. & E. 589; *Bliven v. N. E. Screw Co.*, 23 How., 420 (64 U. S., XVI., 510)."

"The inference from these principles is inevitable that unless some contract is shown, evidence of usage or custom is immaterial."

'And again the same court in the case of *Bank . . . Burkhardt*, 25 Law, Ed. 766, said:

"A general usage may be proved in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing.

"Usage cannot make a contract where there is

none, nor prevent the effect of the settled rules of law. *Barnard v. Kellog*, 10 Wall., 390, 19 L. Ed. 514; *Collender v. Dinsmore*, 55 N. Y., 200; *Adams v. Goddard*, 212; *Thompson v. Riggs*, 5 Wall. 674, 18 L. Ed., 706; *Dykers v. Allen*, 7 Hill, 497."

In the case of *Pencil Co. v. Nashville etc. Ry. Co.* 32 L. R. A. (N. S.) 323, the court defines the difference between "custom" and "usage" and holds that usage cannot make a contract.

The court said:

"We cannot bring ourselves to the conclusion that a bill which bases the complainant's rights to recover upon the breach of a contract can be sustained by proof of a usage and no proof of a contract, or by proof of a custom and no proof of a contract"

The above cases of the highest court in the land would seem to determine the question of usage or trade. As we have attempted to show under previous heads of this brief, *custom or usage could not apply in this case because the parties intended to fix the terms of the contract themselves, as is shown by the correspondence and all the surrounding circumstances.*

In adjudicating rights under a contract, a court's only office is to enforce such rights as fixed by their own agreement; it cannot make a contract for them and determine their respective rights accordingly.

As is set forth in "Exhibit A," attached to the plaintiff's amended complaint, the beginning of this transaction is evidenced by a contract in writing on the 28th

day of April, whereby Story and Work contracted to sell to the defendant Stanfield seven thousand yearling ewes at \$10.00 per head, the same to be delivered at White Sulphur Springs and Three Forks, Montana, on July 1, 1917. On this contract Stanfield had paid Story and Work \$4,000.00, the remainder to be paid when the live stock was delivered.

Stanfield never owned the seven thousand ewes. All that he ever owned was a contract for the purchase of same on which he had paid \$4,000.00. These facts were all known to Rea at the time he sent the initial telegram to Stanfield. It is admitted both in the brief of counsel for plaintiffs and in the amended complaint that in conducting these negotiations Rea was acting as the agent of, and for and on behalf of the plaintiffs, Story and Work, who had contracted to sell these identical sheep to the defendant.

In paragraph V of the amended complaint the pleader uses this language:

“The plaintiffs, desiring to purchase from said Stanfield, the defendant herein, the said ewes, and to purchase all of his rights in said contract for the sale of said ewes, as aforesaid, the said Rea acting as broker in that behalf sent said defendant at his home in Oregon, from Billings, in the state of Montana, a telegram reading as follows, etc.”

Again in paragraph VI of the amended complaint he uses this language:

“The said Rea accepted for himself and on behalf of the said Story and Work the offer so made, etc.”

From an analysis of the original contract from Story and Work to Stanfield and from an analysis of paragraph V of the amended complaint and the admissions of counsel for plaintiffs in his brief, it must be conceded that all that Stanfield had a right to sell was his contract. This was not an ordinary transaction, as would take place between a grower and a man who wants to purchase sheep from the grower, or owner in possession, because the ewes referred to were not in the possession of Stanfield. It was known to both parties that all that Stanfield had or could sell was a *right to purchase*.

To apply the fine haired reasoning of the counsel for plaintiffs, the telegram from Rea to Stanfield must be interpreted thus:

“What will you take for contract to purchase the seven thousand Story and Work yearling ewes.”

Stanfield's reply must be interpreted thus:

“I will sell my contract to purchase the Story and Work yearling ewes on the basis of \$11.50 per head. In other words, you pay me back the \$4,000.00 advance that I paid on these sheep and \$1.50 profit, being the difference between \$10.00 per head, I was to pay for sheep and \$11.50 and I will assign to you my contract.”

Neither Stanfield nor any other man dealing in live stock, who has a contract similar to this would sell anything other than a contract. If he was selling his contract he would certainly want all his money before the delivery and assignment of the contract so that he could take his profit, assign his contract and end the trans-

action in so far as he is concerned.

This is the only logical conclusion that can be reached. Counsel has admitted both in his pleading and in his brief that all Stanfield had a right to sell and all that they were intending to buy from him was his contract.

This being true, then how or by what manner of reasoning can you read into these telegrams the matters counsel attempts to read into them? How, or by what manner of logical deduction can you say that Stanfield would assign his contract to Story and Work and then wait until July 1, for Story and Work to pay him the difference of \$1.50 per head, being the difference between price at which the contract to sell ewes and the price at which they were buying same back. Such reasoning it seems to us is absurd.

We believe that from any one of the many reasons presented it can be seen that there was no contract.

Some courts have held that there was no contract on the grounds set forth in the first subdivision of this brief; some courts have held there was no contract on the grounds set out in each and all of the other subdivisions. Certainly, when all the grounds are present in one case, there is no contract.

We have refrained from making any statement as to the equities of the case, and have tried to present the matter strictly as a question of law, and shall only say that it would be a harsh ruling that requires, under the facts in this case, one man to hold his goods, on a fluctuating market, at the pleasure, disposal and caprice of

another, with whom he did not know he was dealing, for an indeterminable length of time and an indefinite time of payment, when the now alleged agent of that other by his telegrams of purported acceptance expressly warned the offeror that a written contract, of which the offeror had no knowledge, and had not consented to, was being forwarded for him to execute.

We submit that the demurer to the complaint should be sustained.

Respectfully submitted,
BAUER, GREENE & McCURTIN,
E. R. COULTER,

Counsel for Defendant.

No. 1155

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. M. ANDERSON,

Plaintiff in Error,

vs.

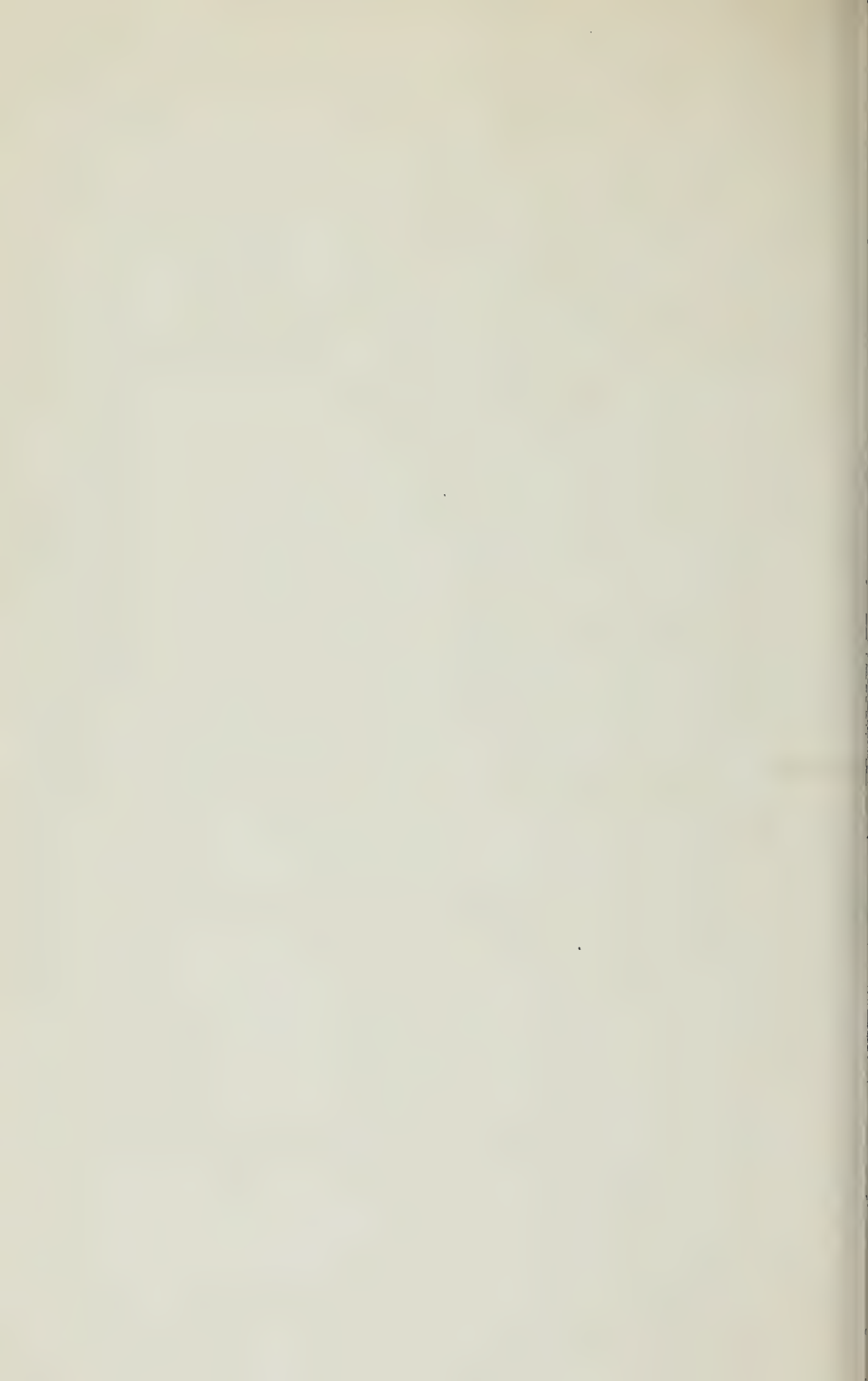
UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.**

FILED
JAN 24 1911
F. D. MONTGOMERY
CLERK



No.

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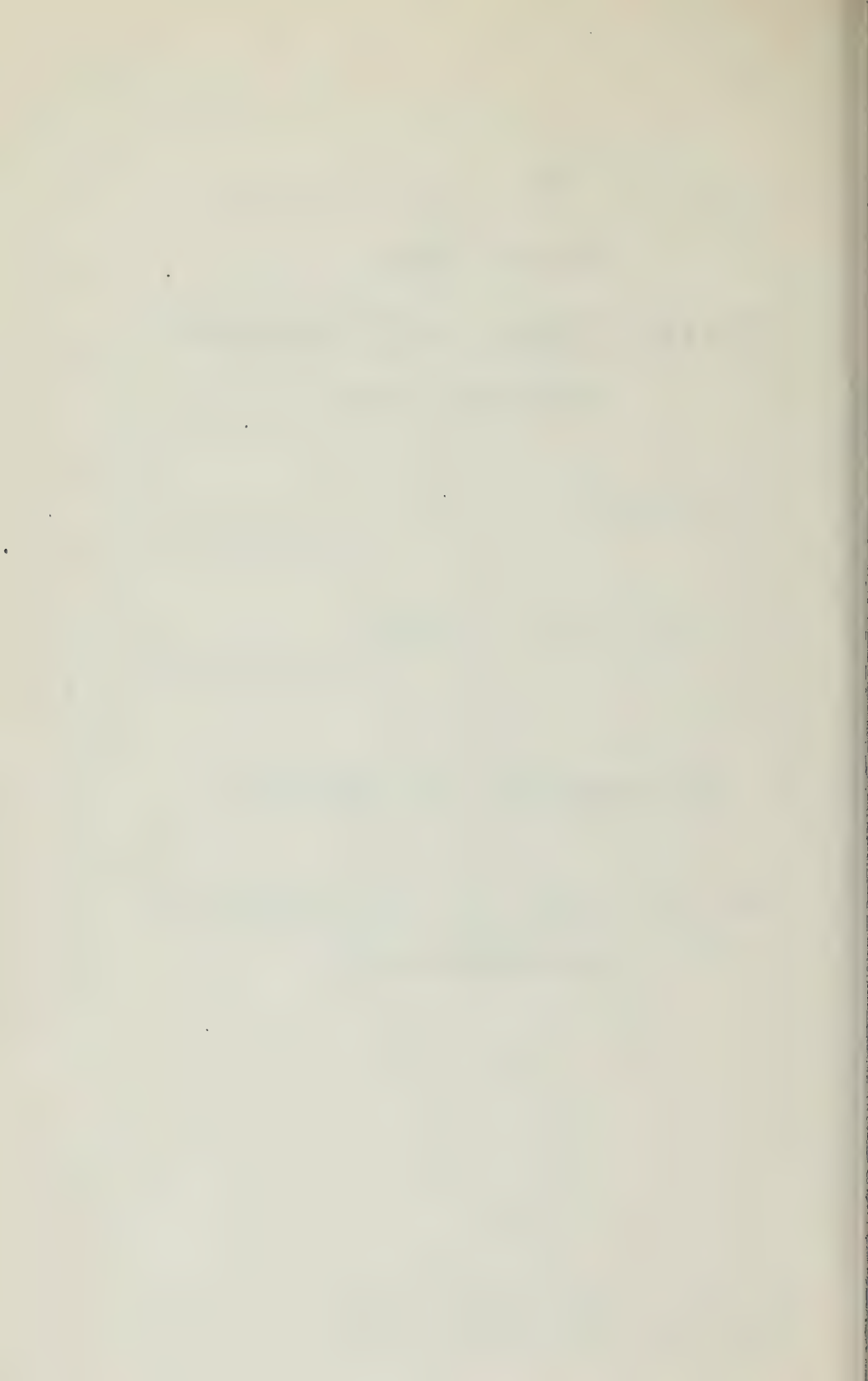
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

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Building, Los Angeles, California.

United States of America, ss.

To the United States of America and to J. Robert O'Connor, United States District Attorney for the Southern District of California,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24th day of November A. D. 1920, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action wherein T. M. Anderson is Plaintiff in Error and you are defendant in error to show cause, if any there be, why the judgment mentioned in the said Writ of Error should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A TRIPPET
United States District Judge for the Southern District of California, this 25th day of October, A. D. 1920, and of the Independence of the United States, the one hundred and forty fifth.

Trippet

U. S. District Judge for the
Southern District of California.

[Endorsed]: *In the* United States Circuit Court of Appeals *for the* NINTH CIRCUIT T. M. Anderson, Plaintiff in Error, *vs.* United States of America, Defendant in Error. Citation Filed Oct 25 1920

at — ~~min. past~~ — ~~o'clock~~ — M Chas. N. Williams,
Clerk Louis J. Somers Deputy Received copy of
within citation this 25th day of Oct 1920 Robert
O'Connor U. S. Atty Burton Briggs Crane Assistant
U. S. Atty.

United States of America, ss.

The President of the United States of America,

To the Judges of the District Court of the United
States, for the Southern District of California,
GREETING:

Because in the record and proceedings, and also in
the rendition of the judgment of a plea which is in the
said District Court, before you between T. M. Ander-
son, plaintiff in error, and the United States of Amer-
ica, defendant in error, a manifest error hath hap-
pened, to the great damage of the said T. M. Ander-
son plaintiff in error as by his complaint appears, and
it being fit, that the error, if any there hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid in this behalf, you are
hereby commanded, if judgment be therein given, that
then, under your seal, distinctly and openly, you send
the record and proceedings aforesaid, with all things
concerning the same, to the United States Circuit Court
of Appeals for the Ninth Circuit, together with this
writ, so that you have the same at the City of San
Francisco, in the State of California, on the twenty-
fourth day of November next, in the said United
States Circuit Court of Appeals, to be there and then

held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. EDWARD D. WHITE,
Chief Justice of the United States, this 25th
(Seal) day of October in the year of our Lord one
thousand nine hundred and twenty and of
the Independence of the United States the
one hundred and forty fifth

CHAS. N. WILLIAMS

Clerk of the District Court of the United
States of America, in and for the
Southern District of California.

By R S Zimmerman

Deputy Clerk.

The above writ of error is hereby allowed.

Trippet

Judge.

I hereby certify that a copy of the within Writ of Error was on the 25th day of October, 1920, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Clerk of the District Court of the
United States for the Southern Dis-
trict of California.

(Seal)

By R S Zimmerman

Deputy Clerk.

The within copy of Writ of Error is hereby, on this
day of....., 19....., lodged
 in the office of the Clerk of the said United States
 District Court, for the Southern District of California,
 Southern Division, for said Defendants in Error.

.....

 Attorney.. for Plaintiff.. in Error.

Clerk of the District Court of the
 United States for the Southern Dis-
 trict of California.

By
 Deputy Clerk.

[Endorsed]: United States Circuit Court of Ap-
 peals *for the* NINTH CIRCUIT T. M. Anderson,
Plaintiff.. in Error vs. United States of America,
Defendant.. in Error Writ of Error Filed Oct 25
 1920 at — min. past — o'clock — M Chas N. Wil-
 liams, Clerk Louis J. Somers Deputy.

No. _____ Filed _____

Vio. Chap. 115, Act Feb. 23, 1917. False representa-
 tions to intending purchaser or settler as to public
 lands of the U. S. subject to entry or sale.

IN THE DISTRICT COURT OF THE UNITED
 STATES IN AND FOR THE SOUTHERN
 DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION.

At a stated term of said Court, begun and holden
 at the City of Los Angeles, within the Southern Divi-

sion of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and twenty;

The Grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That T. M. ANDERSON, whose full and true name is, other than as herein stated, to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the eighth day of September, in the year of our Lord one thousand nine hundred and eighteen, at or near the station of Mortmar, County of Imperial, State of California, within the Southern Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully, and for a promised reward of Two Hundred Forty (\$240.00) Dollars, represent to an intending settler and entry man, to-wit; one Stephan Zsinko, that a certain tract of land shown to the said Stephan Zsinko at said time and place by the said T. M. ANDERSON was public land of the United States, subject to sale, settlement and entry, and did undertake to locate said Stephan Zsinko on said land, and the said T. M. ANDERSON further represented to the said Stephan Zsinko that the said land so shown to the said Stephan Zsinko was of a particular surveyed description, to-wit:

West Half of the Southwest Quarter of
Section 22, and the Southeast quarter of the

southwest quarter of Section 22, and the southwest quarter of the southeast quarter of Section 22, Township 7 South, Range 10 East, S. B. M.

with the intent on the part of the said T. M. ANDERSON to deceive the said Stephan Zsinko, to whom said representations were made, and the said Stephan Zsinko was then and there deceived by the said representations, and did pay to the said T. M. ANDERSON as a consideration for his services in undertaking to so locate the said Stephan Zsinko on said land, the sum of Two Hundred Forty (\$240.00) Dollars, the said T. M. ANDERSON then and there well knowing that the land so shown to the said Stephan Zsinko was not public land of the United States subject to sale, settlement and entry, and that the land so shown to the said Stephan Zsinko was not the

West half of the Southwest Quarter of Section 22, and the southeast quarter of the southwest quarter of Section 22, and the southwest quarter of the southeast quarter of Section 22, Township 7 South, Range 10 East, S. B. M.

but on the contrary was the

East half of the northeast quarter of Section 29, and the south half of the northwest quarter of Section 28, Township 7 South, Range 10 East, S. B. M.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That T. M. ANDERSON, whose full and true name is, other than as herein stated, to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the first day of January, in the year of our Lord one thousand nine hundred and nineteen, at or near the town of Salton, County of Imperial, State of California, within the Southern Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully, and for a promised reward of Four Hundred Eighty Dollars (\$480.00), represent to an intending settler and entry man, to-wit: one Emerson J. Rood, that a certain tract of land shown to the said Emerson J. Rood at said time and place by the said T. M. ANDERSON was public land of the United States, subject to sale, settlement and entry, and did undertake to locate said Emerson J. Rood on said land; and the said T. M. ANDERSON further represented to the said Emerson J. Rood that the said land so shown to the said Emerson J. Rood was of a particular surveyed description, to-wit:

East half of Section 8, Township 8, South,
Range 11 East, S. B. M.

with the intent on the part of the said T. M. ANDERSON to deceive the said Emerson J. Rood, to whom said representations were made, and the said Emerson

J. Rood was then and there deceived by the said representations, and did pay to the said T. M. ANDERSON as a consideration for his services in undertaking to so locate the said Emerson J. Rood on said land, the sum of Four Hundred Eighty Dollars (\$480.00), the said T. M. ANDERSON then and there well knowing that the land so shown to the said Emerson J. Rood was not public land of the United States subject to sale, settlement and entry, and that the land so shown to the said Emerson J. Rood was not the

East half of Section 8, Township 8 South,
Range 11 East, S. B. M.

but on the contrary was

A part of the northeast quarter of Section 17; a part of the South half of Section 9, and a part of the Northwest quarter of Section 16, Township 8 South, Range 11 East, S. B. M.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

THIRD COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That T. M. ANDERSON, whose full and true name is, other than as herein stated, to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the sixth day of August, in the year of our Lord

one thousand nine hundred and eighteen, at or near the town of Salton, County of Imperial, State of California, within the Southern Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully, and for a promised reward of Two Hundred Forty (\$240.00) Dollars, represent to an intending settler and entry man, to-wit: one J. W. O'Hagan, that a certain tract of land shown to the said J. W. O'Hagan at said time and place by the said T. M. ANDERSON was public land of the United States, subject to sale, settlement and entry, and did undertake to locate said J. W. O'Hagan on said land, and the said T. M. ANDERSON further represented to the said J. W. O'Hagan that the said land so shown to the said J. W. O'Hagan was of a particular surveyed description, to-wit:

The South half of the Southwest Quarter and the South half of the Southeast Quarter of Section 2, Township 8 South, Range 10 East, S. B. M., and that all of said South Half of the Southwest Quarter and the South Half of the Southeast Quarter of said Sec. 2, was, with the exception of not more than four acres, above and free from being inundated by the waters of the Salten Sea.

with the intent on the part of the said T. M. ANDERSON to deceive the said J. W. O'Hagan, to whom said representations were made, and the said J. W. O'Hagan was then and there deceived by the said

representations, and did pay to the said T. M. ANDERSON as a consideration for his services in undertaking to so locate the said J. W. O'Hagan on said land, the sum of Two Hundred Forty (\$240.00) Dollars, the said T. M. ANDERSON then and there well knowing that the land so shown to the said J. W. O'Hagan was not public land of the United States subject to sale, settlement and entry, and that the land so shown to the said J. W. O'Hagan was not the

South half of the southwest quarter, and the south half of the southeast quarter of section 2, Township 8 South, Range 10 East, S. B. M., and that all of said South Half of the Southwest Quarter and the South Half of the Southeast Quarter was, with the exception of not more than four acres, above and free from being inundated by the waters of the Salten Sea.

but on the contrary was

A part of the West Half of the Southwest Quarter of Section 1; a part of the Northwest Quarter of the Northwest Quarter of Section 12; a part of the North half of the Northeast Quarter, and a part of the North Half of the Northwest Quarter of Section 11, and a part of the South Half of the Southwest Quarter, and the South Half of the Southeast Quarter, Section 2, all of Township 8 South, Range 10 East, S. B. M.; and in truth and in fact, more than forty

acres of the South Half of the Southwest Quarter of Section 2, Township 8 **South**, Range 10 East, S. B. M., was then and there inundated and covered by the waters of the Salten Sea.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Robert O'Connor United States *Attorne*
T. F. Green ASST. U. S. ATTORNEY

[Endorsed]: Form No. 195. *No.* 2360 Crim UNITED STATES DISTRICT COURT, SOUTHERN *District of* CAL SOUTHERN *Division.* THE UNITED STATES OF AMERICA *vs.* T. M. ANDERSON. INDICTMENT Vio. Chap. 115, Act Feb. 23, 1917. False representations to intending purchaser or settler as to public lands of U. S. subject to entry or sale. *A true bill*, Leo S. Chandler *Foreman.* Filed Oct 8 1920 Chas. N. Williams, Clerk By Wm W. Handy Deputy Clerk *Bail*, \$1500 00 7—433

At a stated Term, to wit: the July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, California, on Friday, the 8th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2360 Crim.
T. M. ANDERSON,)	
	Defendant.)

An indictment having been presented to the court at this time, it is now by the court ordered that same be, and it hereby is filed, and it is further ordered that the bond of defendant be fixed in the sum of \$1500.00.

At a stated Term, to wit: the July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the city of Los Angeles, California, on Wednesday, the 13th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable OSCAR A. TRIPPET,
District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2360 Crim.
T. M. Anderson,)	
	Defendant.)

This cause coming on at this time for the arraignment of defendant and for the entry of his plea; T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government, and defendant being present on bail with his attorney, W. S. Allen, Esq., and defendant T. M. Anderson having been called and arraigned, and having stated his true name to be T. M. Anderson, and having waived the formal reading of the

Indictment, and being required to plead thereto, now enters his plea of Not Guilty; now on motion of T. F. Green, Esq., it is ordered that this cause be, and the same hereby is set down for trial on Oct. 19, 1920.

At a stated Term, to wit: the July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, California, on Monday the 18th day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable OSCAR A. TRIPPET,
District Judge.

United States of America,)	
	Plaintiff,)	
vs.	)	No. 2360 Crim.
T. M. Anderson,)	
	Defendant.)	

This cause coming on at this time for hearing on Demurrer; T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government; and W. S. Allen, Esq., appearing for the defendant; now W. S. Allen, Esq., of counsel as aforesaid, having made argument on behalf of defendant, in support of Demurrer; and T. F. Green, Esq., of counsel as aforesaid, having made reply thereto, it is now by the court ordered that this Demurrer be, and the same hereby is overruled.

At a Stated Term, to wit: the July Term of the District Court of the United States of America, within and for the Southern District of California, Southern

Division, held at the Court Room thereof, in the city of Los Angeles, California, on Tuesday the 19th day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable OSCAR A. TRIPPET,
District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2360 Crim.
T. M. Anderson,)	
	Defendant.)

This cause coming on at this time for trial by the court and a jury to be impanelled; T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government; and defendant T. M. Anderson being present in court with his counsel L. W. Allen, Esq., and Ed. de St. Maurice being present as shorthand reporter of the proceedings and testimony; and now on motion of L. W. Allen, Esq., of counsel as aforesaid, it is by the court ordered that the firm of Allen, Allen and Swenden be substituted as counsel for defendant instead of L. W. Allen; and the counsel for the respective parties having stated that they are ready for trial to proceed, it is now by the court ordered that the trial proceed, and that a jury of 12 men be impanelled herein, and thereupon the names of the following petit jurors having been drawn from the box and called and sworn on their voir dire, to wit: R. B. Williamson, J. W. Walter, A. Blakeboro, Truman Berry, Charles C. Stanley, John Dodson, James F. Rothgeb, Oscar A. Traversy, John A. Burton, Geo. J. Brunner, J. D. Fields, and Frank Dick; and

Said jurors having been examined by the court and counsel for the respective parties for cause and passed for cause; and R. B. Williamson and A. Blakeboro, having been peremptorily challenged by counsel for the defendant, and excused; and the names of two other petit jurors having been drawn from the jury box, called and sworn on their voir dire, to wit: J. Herbert Hall and Robert W. Poindexter; and said two petit jurors having been examined by the court and counsel for the respective parties and passed for cause; and Robert W. Poindexter, having been peremptorily challenged by the Government, and by the court excused; and the name of one other petit juror having been drawn from the jury box and called and sworn on his voir dire, to wit: L. W. Ballard; and said juror having been examined by the court and counsel for the respective parties and passed for cause; and having been challenged peremptorily by counsel for the defendant and excused; and the name of one other petit juror having been drawn from the jury box and called and sworn on his voir dire, to wit: Max N. Newmark; and said juror having been examined by the court and counsel for the respective parties and passed for cause; and said jury having been accepted as the jury to try this cause; said jury as so impanelled and sworn, consisting of the following named persons, to wit:

- | | |
|-----------------------|----------------------|
| 1. Max N. Newmark | 7. James F. Rothgeb |
| 2. J. W. Walter | 8. Oscar A. Traversy |
| 3. J. Herbert Hall | 9. John A. Burton |
| 4. Truman Berry | 10. Geo. J. Brunner |
| 5. Charles C. Stanley | 11. J. D. Fields |
| 6. John Dodson | 12. Frank Dick |

and the court having given to the jury an explanation of the United States land surveys; and

Now at the hour of 11:15 o'clock A. M., the court having duly admonished and cautioned the jury not to talk to anyone about the case, or any matter connected therewith, or permit anyone to talk to them about the case, or any matter connected therewith, or to talk with each other about the case, until it is finally submitted to them under the instructions of the court; and

Now at the hour of 11:15 o'clock A. M., the court having ordered that a recess be taken for 10 minutes; and

Now at the hour of 11:25 o'clock A. M., the court having reconvened, and defendant being present as before, and counsel for the respective parties being present as before; and Ed. de St. Maurice, being present as shorthand reporter; and the court announced that the jury is present; and

W. J. Wilhelm, having been called and sworn, and having testified on behalf of the Government; and in connection with the said testimony the following exhibits having been offered by the court and admitted and ordered filed, to wit:

Court's Ex. 1. – Drawing of Surveys;
and now at the hour of 12:10 o'clock P. M., the court having admonished the jury in the usual manner; and having ordered that a recess be taken to the hour of 2:00 o'clock P. M., of this day; and

Now at the hour of 2:00 o'clock P. M., the court having reconvened, and counsel for respective parties

being present as before, and defendant being present, and Ed. de St. Maurice, being present as shorthand reporter; and the court having announced the jury is present, and all being present; and

W. H. Wilhelm, a witness heretofore sworn, having resumed the stand and having testified further on behalf of the Government; and

E. J. Rood, having been called and sworn, and having testified on behalf of the Government; and the following exhibits having been offered in evidence, are admitted and ordered filed, to wit:

U. S. Ex. 2. – Letter Anderson to Rood 11/18/18

U. S. Ex. 3. – Contract Anderson and Rood

U. S. Ex. 4. – Government land entry

U. S. Ex. 5. – Proposed irrigation system

U. S. Ex. 6. – Supplemental affidavit

U. S. Ex. 7. – Homestead entry; and

Now at the hour of 3:25 o'clock P. M., the court orders that a recess be taken for five minutes; and

Now at the hour of 3:30 o'clock P. M., the court having reconvened, and defendant being present as before, and counsel for the respective parties being present as before, and Ed. de St. Maurice being present as shorthand reporter; and the court having announced that the jury is present; and

E. O. Rood, a witness heretofore sworn, having resumed the stand, and having testified further on behalf of the Government; and

H. J. Humphrey, having been called and sworn, and having testified on behalf of the Government; and

Now at the hour of 4:30 o'clock P. M., the court having admonished the jury in the usual manner, it is now by the court ordered that a recess be taken to Wednesday, Oct. 20, 1920, at the hour of 10 o'clock A. M., and that this cause be, and the same hereby is continued to that time for further trial.

At a stated term, to wit: the July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of Los Angeles, California, on Wednesday the 20th day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable OSCAR A. TRIPPET,
District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2360 Crim.
T. M. Anderson,)	
	Defendant.)

This cause coming on at this time for further trial by the court; T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government; and defendant T. M. Anderson being present on bail together with his counsel L. W. Allen and W. S. Allen, of the law firm of Allen, Allen and Swender, counsel for the defendant; and Ed. de St. Maurice, being present as shorthand reporter of the proceedings and testimony; and the court having announced that the jury is present; and having ordered that the trial be proceeded with; and

H. J. Humphreys, a witness heretofore sworn, having resumed the stand and having testified further on behalf of the Government, and in connection with said testimony the following exhibit having been offered in evidence, is admitted and ordered filed, to wit:

U. S. Ex. 8. – Government Survey Stake; and

W. H. Wilhelm, a witness heretofore sworn, having been recalled, and having testified further on behalf of the Government; and

J. W. O'Hagan, having been called and sworn, and having testified on behalf of the Government; and in connection with the said testimony the following exhibits having been offered in evidence, are admitted and ordered filed, to wit:

U. S. Ex. 9. – Letter Anderson to O'Hagan

U. S. Ex. 10. – Letter Anderson to O'Hagan

U. S. Ex. 11. – Contract Anderson to O'Hagan

U. S. Ex. 12. – Homestead entry S½ SE¼

U. S. Ex. 13. – Letter Anderson to O'Hagan

Now at the hour of 11:30 o'clock A. M., the court having duly admonished the jury and cautioned it not to talk to anyone about the case, or any matter connected therewith, or permit anyone to talk to them about the case or any matter connected therewith; or to talk with each other about the case, until it is finally submitted to them under the instructions of the court; and the court having thereupon ordered that a recess be taken for five minutes; and

Now at the hour of 11:35 o'clock A. M., the court having reconvened and defendant and counsel for the respective parties being present as before, and Ed. de

St. Maurice being present as shorthand reporter; and the court having announced that the jury is present; and

J. W. O'Hagan, a witness heretofore sworn, having resumed the stand, and having testified further on behalf of the Government; and Stephen Zsiuko having been called, sworn and having testified on behalf of the Government, and in connection with said testimony the following exhibits having been offered in evidence, are admitted and ordered filed, to wit:

U. S. Ex. 14. – Contract Anderson to Zsiuko

U. S. Ex. 15. – Part of Superior Court Record

U. S. Ex. 16. – Homestead Entry;

Now at the hour of 12:00 o'clock noon, the court having duly admonished the jury in the usual manner, now orders that a recess be taken to the hour of 2:00 o'clock P. M., of this day, and that this cause be, and the same hereby is continued to that time; and

Now at the hour of 2:00 o'clock P. M., of this day court having reconvened, and defendant, and counsel for the respective parties being present as before, and Ed. de St. Maurice, being present as shorthand reporter; and the court having announced that the jury is present; and

Stephen Zsiuko, a witness heretofore sworn, having resumed the stand, and having testified further on behalf of the Government; and in connection with said testimony, the following exhibits having been offered in evidence, are admitted and ordered filed herein, to wit:

U. S. Ex. 17. – Relinquishment

U. S. Ex. 18. – Desert Land Entry

U. S. Ex. 19. – Description of land; and

H. W. Hudson, having been called and sworn, and having testified on behalf of the Government; and

Now at the hour of 2:50 o'clock P. M., the Government having no further testimony to offer, rests; and

L. W. Allen, Esq., of counsel as aforesaid for the defendant, having moved the court to declare a non-suit as to the third count of the indictment, and said motion having now by the court been overruled; and

E. O. Rood, a Government witness heretofore sworn, having been recalled by the defendant, and having resumed the stand and having testified further; and in connection with said testimony the following exhibits having now been offered in evidence, are admitted and ordered filed, to wit:

U. S. Ex. 20. – Blueprint of Land Sections

U. S. Ex. 21. – Blueprint of Land Sections; and

T. M. Anderson, having been called and sworn, and having testified on behalf of the defendant; and

Now at the hour of 3:25 o'clock P. M., the court orders that a recess for five minutes be taken; and

Now at the hour of 3:30 o'clock P. M., the court having reconvened, and defendant and counsel for the respective parties being present as before, and Ed. de St. Maurice, being present as shorthand reporter; and the court having announced that the jury is present; and

T. M. Anderson, a witness heretofore sworn, having resumed the stand, and having testified further on behalf of the defendant; and

Now at the hour of 4:15 o'clock P. M., the court having admonished the jury in the usual manner, orders that a recess be taken to Thursday, October 21, 1920, and that the cause be continued to that time for further trial.

At a stated term, to wit: The July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the city of Los Angeles, California, on Thursday the 21st day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable OSCAR A. TRIPPET,
District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2360 Crim.
T. M. Anderson,)	
	Defendant.)

This cause coming on at this time to be further tried by the court, a jury having heretofore been impanelled; T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government; and defendant being present in court on his own recognizance with his attorneys, Allen and Allen, Esqs., of the law firm of Allen, Allen & Swender, counsel for the defendant; and John P. Doyle, being present as shorthand reporter of the proceedings and testimony; and the court having announced that the jury is present; and having ordered that the trial be proceeded with; and

T. M. Anderson, defendant, having resumed the stand and having testified further on his own behalf,

and in connection with said testimony, the following exhibits are offered in evidence and admitted and ordered filed herein, to wit:

Deft's Ex. B. – Map of Power Line

Deft's Ex. C. – Map of Power Line

Deft's Ex. D. – Certified Field Notes

Deft's Ex. E. – Certified Field Notes

U. S. Ex. 22. – Advertisement Feb. 13, 1919; and

Now at the hour of 11:30 o'clock A. M., the court having given the jury the usual admonition, a recess is taken for five minutes; and

Now at the hour of 11:35 o'clock A. M., the court having reconvened, and all being present as before, the counsel for the respective parties being present as before, and John P. Doyle, being present as shorthand reporter of the proceedings and testimony; and

T. M. Anderson, defendant, having resumed the stand, and testified further on his own behalf; and

L. G. Barrow, James M. Dewey and W. S. Summer, having respectively been called, sworn, and having respectively given their testimony on behalf of the defendant; and

James M. Dewey, a witness heretofore sworn, having been recalled, and having testified further on behalf of the defendant; and

Now at the hour of 2:55 o'clock P. M., the defendant having no further testimony to offer, rests; and

H. W. Hudson, a witness heretofore sworn, having been recalled to the stand, and having testified further on behalf of the Government in rebuttal; and

W. B. Swindell, having been called, sworn, and having testified on behalf of the Government; and

W. H. Wilhelm, a witness heretofore sworn, having been recalled to the stand, and having testified for the Government, in rebuttal; and

Now at the hour of 3:40 o'clock P. M., the court having given the jury the usual admonition, a recess is taken for five minutes; and

Now at the hour of 3:45 o'clock P. M., the court having reconvened, and all being present as before, and counsel for the respective parties being present as before, and John P. Doyle, being present as shorthand reporter; and the court having announced the jury as present; and

W. H. Wilhelm, a witness heretofore sworn, having resumed the stand, and having testified further in rebuttal for the Government; and

Stephen Zsuiko, a witness heretofore sworn, having been recalled to the stand, and having testified on behalf of the Government in rebuttal; and

E. O. Rood, and J. W. O'Hagan, witnesses heretofore sworn, having been recalled to the stand, and having testified for the Government in rebuttal; and

Now at the hour of 3:55 o'clock P. M., the Government having no further testimony to offer, rests; and

W. B. Swindell, and T. M. Anderson, heretofore sworn, having been recalled by the defendant and having testified further on behalf of the defendant; and

O. H. Lee, H. Clark Ferry and M. C. McCulla, having been respectively called, sworn, and having

respectively given their testimony on behalf of the defendant; and

Now at the hour of 4:09 o'clock P. M., T. F. Green, Esq., of counsel as aforesaid, having presented the opening argument on behalf of the Government; and

Now at the hour of 4:30 o'clock P. M., L. W. Allen, Esq., of counsel as aforesaid, having presented the opening argument on behalf of the defendant; and

Now at the hour of 4:40 o'clock P. M., the court having given the jury the usual admonition, a recess is taken in this cause until Friday, Oct. 22, 1920, for further trial.

At a stated term, to wit: The July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the city of Los Angeles, California, on Friday the 22nd day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable OSCAR A. TRIPPET,
District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2360 Crim.
T. M. Anderson,)	
	Defendant.)

This cause coming on at this time for further trial by the court; T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government, and defendant being present in court on his own recognizance with his counsel, W. S. Allen and L. W. Allen, Esq., of the

law firm of Allen, Allen and Swender, counsel for the defendant; and W. C. Wren, being present as shorthand reporter of the proceedings and testimony; and the court having announced the jury as present and having ordered the trial proceeded with; and

W. S. Allen, Esq., of counsel as aforesaid, having presented the closing argument on behalf of the defendant; and

T. F. Green, Esq., of counsel as aforesaid, having presented the closing argument on behalf of the Government; and

The Court having given its instructions to the jury, and now, at the hour of 11:00 o'clock A. M., J. W. Bell, a Deputy U. S. Marshal, having been sworn to take charge of the jury, and the jury having retired in charge of said Deputy U. S. Marshal, for the deliberation of their verdict; and

Now at the hour of 12:05 o'clock P. M., and good cause appearing therefor, it is by the court ordered that the Deputy U. S. Marshal take the jury out to dinner at the expense of the Government; and

Now at the hour of 3:15 o'clock P. M., the jury having come into court, and the court having announced that the jurors are all present, and all being present, and the jury having been asked by the court if they have agreed upon a verdict, and having, through their foreman, stated that they had so agreed, and having been required to present their verdict, and said verdict having been read by the clerk, and the verdict as so presented and read by the clerk, having

been ordered by the court to be entered and recorded, said verdict as so rendered, entered and recorded, being as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

THE UNITED STATES OF)	
AMERICA,)	Plaintiff,)
vs.)	No. 2360 Crim.
T. M. ANDERSON,)	
Defendant.)	

WE, the JURY in the above-entitled cause, find the DEFENDANT T. M. ANDERSON GUILTY as charged in the SECOND COUNT OF THE INDICTMENT, and NOT GUILTY as charged in the THIRD COUNT OF THE INDICTMENT, and cannot agree as to the FIRST COUNT OF THE INDICTMENT.

LOS ANGELES, CALIFORNIA, OCTOBER 22, 1920.

M. N. NEWMARK, FOREMAN

It is now by the court ordered that this cause be, and the same hereby is continued to Monday, Oct. 25, 1920, for imposing of sentence as to the second count of the Indictment, defendant to remain on bond given in 1843 Crim.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

)	
)	
THE UNITED STATES OF)	
AMERICA,	) Plaintiff,	
vs.	)	No. 2360 Crim.
T. M. ANDERSON,)	
Defendant.)	

WE, the JURY in the above-entitled cause, find the Defendant, T. M. ANDERSON,—~~GUILTY as charged in the FIRST COUNT of the INDICTMENT, and~~ GUILTY as charged in the SECOND COUNT of the INDICTMENT, and not GUILTY as charged in the THIRD COUNT of the INDICTMENT. and cannot agree on the first count of the Indictment.

LOS ANGELES, CALIFORNIA, OCTOBER 22, 1920.

M. N. NEWMARK, FOREMAN.

Filed Oct 22 1920. Chas. N. Williams, Clerk Fred E. Subith, Deputy.

At a Stated Term, to wit: the July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the city of Los Angeles, California, on Monday the 25th day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty.

PRESENT: The Honorable OSCAR A. TRIPPET,
District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2360 Crim.
T. M. Anderson,)	
	Defendant.)

This cause coming on at this time for imposing of sentence as to the second count of the indictment; and T. F. Green, Esq., Assistant U. S. Attorney, appearing for the Government, and defendant being present on bail, with his counsel L. W. Allen, Esq., and having been called and having made a statement on behalf of himself; the court now pronounces sentence upon defendant for the crime of which he now stands convicted, namely: Vio. Chap. 115, Act Feb. 23, 1917. False representations to intending purchaser or settler as to public lands of the U. S., subject to entry or sale: and the judgment of the court is that defendant T. M. Anderson be confined in the Los Angeles County Jail for the term and period of 10 months.

[Endorsed]: *No* 2360 Crim. IN THE DISTRICT COURT OF THE UNITED STATES for the Southern District of California, Southern Division. UNITED STATES OF AMERICA, PLAINTIFF, vs. T. M. ANDERSON, DEFENDANT. JUDGMENT ROLL Filed October 27 1920 CHAS. N.

WILLIAMS Clerk By Fred E Subith Deputy Clerk
Recorded Minute Book No 38 Page 112

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

UNITED STATES OF AMERICA,)	
)	
	)	Plaintiff,
	)	No. 2360-
	)	Crim.
vs.)	
	)	BILL OF
T. M. ANDERSON,	)	EXCEP-
	)	TIONS.
)	
Defendant.)	
)	
)	

Be it remembered that heretofore, to-wit, on the 8th day of October, 1920, the Grand Jury of the United States, in and for the Southern District of California, Southern Division, did find and return unto the above entitled Court its indictment against the defendant, T. M. Anderson, for violation of Act of February 23, 1917, Chap. 115, relating to "False Representations to Intending Purchaser or Settler as to Public Lands of the United States Subject to Entry or Sale"; and thereafter, on the 14th day of October, 1920. the said T. M. Anderson entered a plea of "not guilty" to said indictment; that thereafter, on October 16, 1920, the defendant filed a demurrer to the indict-

(Testimony of A. A. Wilhelm.)

ment, which demurrer was argued before the Court on October 18th, 1920, and was at said time overruled by the Court.

That thereafter, on the 19th day of October, 1920, the said cause came on duly and regularly for trial, the Government being represented by T. F. Green, Esq., Assistant United States District Attorney for the Southern District of California, and the defendant being represented by Messrs. Lawrence W. Allen, W. S. Allen, and Hubert W. Swender.

The indictment was composed of three counts, and for the sake of convenience the counts may be called the Zsinko, Rood and O'Hagan, being counts one, two and three of the indictment in the order named.

Upon the first count, that is, the Zsinko count, the jury disagreed.

Upon the third count, that is, the O'Hagan count, the defendant was acquitted.

Upon the second count, that is, the Rood count, the defendant was convicted. It is upon the second count to the indictment that defendant takes this appeal.

Testimony of Mr. A. A. Wilhelm, for the Government:

“A. A. WILHELM,

a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

THE CLERK: What is your name?

A. A. A. Wilhelm.

DIRECT EXAMINATION

BY MR GREEN:

Q What is your business, Mr. Wilhelm?

A I am a special agent of the Government, representing the General Land Office.

Q How long have you been in that position?

A A little over ten years.

.

Q Now, referring to Sections 8, 9, 17, and 16 in that particular District, Township 8 South, Range 11 East, have you recently examined that particular District?

A I have examined it.

Q Referring to Sections 8 and 9 in particular, have you examined that?

A I have.

Q How recently?

A The particular examination in detail was made in March, 1920.

Q Who was with you, if anybody?

A H. J. Humphreys, of Mecca.

Q Now, referring to the plat -- blueprint which I have placed on the board, I will ask you who made that, if you know?

A I did.

Q Does that correctly represent the situation there as to the land?

A It does.

Q Now, referring to the east half of Section 8, will you step down there with the pointer and indicate to the Court and Jury.

(Testimony of A. A. Wilhelm.)

A this from this corner to this, represents one mile.

Q Well, give the legal description so the Reporter can get it. Indicating the southeast corner of 8.

A This point indicates the southeast corner of Section 8, Township 8 South, Range 11 East. The distance from this corner to this is one mile. This corner represents the northeast corner of Section 8. Outlined in red is one-half section representing the east half of Section 8. East of this line is Section 9. South of the line, on the south line of Section 8, is Section 17. Only three-fourths of Section 17 is shown here -- the south half of the south half, which is further down. East of Section 17 is Section 16. Only three-fourths of Section 16 being shown on the blue-print.

Q Now, you carefully examined Sections 8 and 9, 17 and 16 there?

A I did.

Q You went over the land. Now, describe the east half of Section 8 and what those characters indicate on there.

MR W. S. Allen: If the Court please, we will object to it as being incompetent, irrelevant and immaterial. The only proper proof would be the field notes of the Government surveyor.

THE COURT: Objection overruled.

MR W. S. ALLEN: Note an exception.

Q BY MR GREEN: You made a personal examination of it yourself?

(Testimony of A. A. Wilhelm.)

A I did, at this point.

Q Which is what?

A Which represents the northeast corner of Section 8. There is a row of stakes --

THE COURT: What?

A An old stake -- a Government survey monument. From that stake I measured one-half mile to this point (indicating.)

Q BY MR GREEN: Which is what?

A Which is the north center of Section 8. From the point of beginning, going westward, the land rises abruptly. For a few chains from the starting point the land is level.

Q Just a moment, Mr. Wilhelm: For the benefit of the Jury, will you indicate what distance is a chain -- how many feet?

A A chain is 66 feet; 80 chains make one mile.

Q All right; proceed.

A From the starting point to the next point, which I indicate, would be one-quarter of a mile, or 20 chains. Before making 20 chains, a few feet, the land becomes very steep and broken, covered with bowlders and entirely too rough for any agricultural purpose.

MR W. S. ALLEN: If the Court please, we ask to have that stricken out as a conclusion of the witness.

THE COURT: It will be stricken out.

Q BY MR GREEN: Just describe the land, Mr. Wilhelm -- the character of the soil in there, Mr. Wilhelm?

MR W. S. ALLEN: Objected to as being irrelevant and immaterial.

(Testimony of A. A. Wilhelm.)

THE COURT: Overruled.

MR W. S. ALLEN: Exception, please, in each of those.

A The soil in the northeasterly portion of that quarter-section is sand.

Q BY MR GREEN: I call your attention to three little characters there. What do they indicate?

A High sand dunes - - small mountains of sand.

Q Covered by vegetation?

A Practically nothing; very few small sagebrush around the base.

Q Proceed.

A The westerly portion of the tract consists of a sandstone ridge, the center of the sandstone ridge crossing the west line of this half-section near the northwest corner.

MR W. S. ALLEN: If the Court please, at this time we object to the use of this map for the reason that he has some characters drawn on there which, in my judgment, would tend to prejudice this defendant, by being the conclusions of this witness. If the map were without those lines, merely the section lines, we have no objection to it, but we do object to those characters being drawn on there in that Section in that way, and we therefore think that the use of this map is prejudicial to the defendant, and we will object to it.

THE COURT: I will let him explain what those characters are. The objection will be overruled. (Ad-

dressing the witness) Explain what the characters are.

A The marks running almost north and south, a little northwesterly and southeasterly, represent the course of the high sandstone ridge upon which there is no soil. The characters extending eastward represent washes which break up the surface and the land slopes from the west to the east at the rate of about 300 feet to the mile.

Q BY MR GREEN: Now, extending on down to the southeast quarter of the Section, describe that.

A The same sandstone ridge crosses it, but covers not quite so great a portion as is covered in the northeast quarter. From a survey which I made, extending around the half-section, I have shown here with the meander line, approximately, the land which could be plowed or tilled if other conditions were favorable. West of that meander line the sandstone extends to the surface.

Q Approximately how high is that sand ridge -- I mean how high above the east line of Section 8, would you say?

A At least 150 feet.

Q At least that. Now, you have called attention to a meandering line there. Take the northeast quarter; what does that represent? Referring to the northeast quarter of Section 8, now, what does that meandering line represent?

A A division of the land which has a surface soil and a land which has no surface soil.

MR W. S. ALLEN: If the Court please, we object

(Testimony of A. A. Wilhelm.)

to this question and answer on the ground that it is incompetent, irrelevant and immaterial. It is a conclusion of this witness as to what the contour or surface of this land may be, and what it is useful for, and how much of it could be used. On the further ground that it does not prove or tend to prove any issues in this case, the question being whether he was shown this land, or not.

THE COURT: Well, I don't know whether the evidence is material at the present time. I think it is relevant, but I think this witness might be further qualified as to give his opinion concerning the character of the soil.

MR GREEN: Yes, sir; we intend to do that just as soon as we get through with the description.

THE COURT: Objection overruled.

MR W. S. ALLEN: If the Court please, our objection goes to that, that it is immaterial as to the character of the soil.

THE COURT: Well, I don't know. The character of the soil sometimes is important in the case for the purposes of showing that a man could not be fooled or that he could be fooled. I will overrule the objection.

MR W. S. ALLEN: May I make the further objection, your Honor, that under the pleadings in this case the character of the soil is not brought in question. The question is whether he was shown this particular section of land.

THE COURT: Yes. Well, that may be so, but

(Testimony of A. A. Wilhelm.)

it would assist or tend to show that the man was intending to perpetrate a fraud. Fraud is involved here. I will overrule the objection.

MR W. S. ALLEN: Exception.

Q BY MR GREEN: Now, approximately how much land in the northeast quarter of that Section could be cultivated for any purpose?

MR W. S. ALLEN: Objected to on the ground that no proper foundation has been laid for it.

Q BY MR GREEN: Are you familiar with all the land in that district, and its particular soil and what it produces?

A I am.

Q BY THE COURT: How long have you been acquainted with lands of that character?

A Oh, for ten years.

Q And do you know what land in that neighborhood can be cultivated and what land cannot be cultivated?

A I do.

Q Do you know what the lands will grow and what they will not grow? What lands will grow things and what will not grow?

A I do.

Q Have you been making a study of it for ten years?

A I have.

THE COURT: The objection will be overruled.

MR W. S. ALLEN: If the Court please, we will enter an objection to all those questions on the ground that they are incompetent, irrelevant and immaterial.

(Testimony of A. A. Wilhelm.)

THE COURT: Well, the objection is overruled.

MR W. S. ALLEN: An exception, please.

Q BY MR GREEN: Answer the question as I originally asked it, Mr. Wilhelm.

A. About thirty acres.

Q About thirty acres out of what portion?

A 160, in the northeast quarter.

Q Now, as to the southeast quarter of Section 8?

A About 50 acres

Q BY THE COURT: How many?

A 50.

Q 50 acres?

A Out of 160.

Q BY MR GREEN: Now, I call your attention to the triangular shape there. Indicate on there with chalk if there is any road leading to or from that land, or any highway, if you remember, approximately?

A Approximately, this is the line of an old wagon-road that leads across the desert (indicating).

Q Take it clear down to where it leads, if you know.

A Back here to the Salton Railway Station.

Q Approximately what distance from the railway station to where it intersects the south line of Section 8 -- south-east corner of the section?

A 1-1/2 miles.

Q Now, did you travel that road?

A I did not.

Q Are you familiar with the water conditions in that particular district?

(Testimony of A. A. Wilhelm.)

A I am; I have made extensive investigations.

Q As to the east half of Section 8, what are the water conditions there, if you know?

MR L. W. ALLEN: Now, if your Honor please, we object to that question on the ground that it is incompetent, irrelevant and immaterial, and makes no difference whether there is any water there, or not.

THE COURT: Well, I think it might make a great deal of difference.

MR GREEN: I should say it would.

THE COURT: Whether a man wanted to buy it or not, or enter it.

MR L. W. ALLEN: Well, that is so, too, your Honor, but the question in this case is, first, was it the Government land, and, second, was the man shown this land?

THE COURT: Yes; and he was shown land for the purpose of getting money out of him to locate it. Now, if you locate a man - - show a man a good forty acres and say, "This is a certain described forty acres", and it looks good to him, he is liable to put up money; but if it is all rock and hill, he is not liable to put up money. There is where the fraud comes in.

MR L. W. ALLEN: Certainly.

THE COURT: Objection overruled.

MR L. W. ALLEN: Exception, please.

A Along the east line of each of these quarter sections water might be developed in wells in sufficient quantities for irrigation purposes.

MR W. S. ALLEN: Objected to, if the Court Please, as calling on this man's imagination - - a mere

(Testimony of A. A. Wilhelm.)

conclusion of the witness. Wells might be drawn anywhere.

THE COURT: The objection will be overruled.

MR W. S. ALLEN: Exception.”

And the witness Wilhelm testified further on direct and cross examination, and thereupon other witnesses were called and testified on behalf of the government, and the defendant took the stand and testified in his own behalf, and was cross examined by the United States Attorney.

The defendant requested that the jury be instructed as follows:

DEFENDANT'S INSTRUCTION NO. 2.

“The Court instructs you that any representation made by the defendant as to the quality of the land shown, or as to the nature of the land shown, or as to what the land shown could produce, or as to whether water for irrigation or domestic use could be developed or found upon the land shown, is not a representation of the “particular surveyed description” of the land so shown.”

DEFENDANT'S INSTRUCTION NO. 6.

“The Court instructs you that if you shall believe from the evidence that the defendant Anderson showed Mr. Rood the land upon which the defendant Anderson filed him, then the defendant is not guilty of any violation of Chap. 115, Act of Feb. 23, 1917, and you will therefore return a verdict of “not guilty” upon the second count of the indictment.”

DEFENDANT'S INSTRUCTION NO. 8.

"The Court instructs you that even if you shall believe from the evidence that the defendant Anderson made false representations to Zsinko, and to Rood and to O'Hagan as to the quality of their respective land, or as to what their lands would produce, or as to the number of acres thereof which were inundated by the waters of the Salton Sea, or as to whether water for irrigation or domestic use could be produced upon their land; if nevertheless and notwithstanding such representations just enumerated you shall believe that the defendant showed Zsinko, Rood and O'Hagan respectively the land upon which the defendant located them, then your verdict will be "not guilty" upon each of the three counts to the indictment."

The defendant requested the Court to request the jury to make special findings on the following question:

"Did the defendant Anderson take Mr. Rood onto the land and show him the land upon which the defendant filed him?

"Answer:"

The Court then instructed the jury as follows:

INSTRUCTIONS TO JURY

THE COURT: The law under which the defendant is being prosecuted has been read to you, but I will read it again.

"Any person who for a reward paid or promised to him in that behalf" --

There does not seem to be any controversy here but what a reward was paid or promised in each of these three cases --

“Any person who for a reward paid or promised shall undertake to locate for an intending purchaser, settler or entryman any public lands of the United States subject to disposition under the public land laws, and who shall wilfully and falsely represent to such intending purchaser, settler or entryman that any tract of land shown to him is public land of the United States, subject to sale, settlement or entry, or that it is of a particular surveyed description, with intent to deceive the person to whom such representation is made, or who in reckless disregard of the truth shall falsely represent to any such person that any tract of land shown to him is public land of the United States, subject to sale, settlement or entry, or that it is of a particular surveyed description, thereby deceiving the person to whom such representation is made, shall be deemed guilty of a misdemeanor and shall be punished,” and so forth.

Now, the punishment is of no matter to you. That is for the Court. The punishment specified is that he shall be punished by a fine not exceeding \$300, or by imprisonment for a term not exceeding one year; that is to say, the maximum is given, but there is no minimum specified. Now, gentlemen, this law is a simple matter, but yet it may be confusing to you, and I am

going to talk very carefully to you so that you may understand.

(The Court descended from the bench and stood before the Jury, where a certain map was suspended upon a rack).

Now, in the Zsinko case, Zsinko was located -- in the Land Office, the defendant had Zsinko locate these lands (indicating on map). Now, Zsinko testified that the lands the defendant showed him were these lands (indicating on map), and told him that he was being located on these lands, and not these lands (indicating). Now, it may be that the defendant showed him these lands, but the question is, did he represent that these lands were described according to these lands (indicating). It was not necessary for the defendant to say in so many words to Mr. Zsinko, "Your land is of a certain description." Zsinko depended upon him, when he got to the Land Office, to write in the application for entry of homestead the land which the defendant had shown him; and if he wrote some other description in, instead of the land he showed him, why then he would make a representation that would be false, according to the statute. It is a question, of course, of veracity between Zsinko and the defendant, as to whether or not these are the lands he showed him, or those (indicating).

Now, you take this land here to Rood (indicating), the east half of section 8, Township 8 South, Range 11. That is the land, now, that Rood located in the Land Office. Well, it is claimed in the testimony by Mr. Rood that he did not show him this land at all

as being the land that he was going to locate, but he showed him other land in here (indicating). And of course, if he showed him this land and took him to the Land Office and had him locate on this land (indicating), the making out the papers for him to sign and locate on that land would be a misrepresentation concerning the particular description, referred to in the statute.

And it is the same with this location here (indicating). If he showed him one tract and took him to the Land Office, and in reckless disregard of the truth wrote a different description in the Land Office from what he had shown him on the ground, why then he committed the crime condemned by the statute.

Now understand, gentlemen, that the United States statute does not make it a crime for a fellow or a man to misrepresent the character of the soil. It was not a crime, although it may have been ever so villainous, for the defendant to say to these men, "This land here on the desert is as good as this land in Mecca that I showed you." It is not a crime under the United States statute for him to represent that this is a well and this water is sweet, when in fact it was a cistern and the water in the wells was bitter. That would not be a crime denounced by the statute.

Now, for instance, if you were to go out on the desert to locate a piece of land, you would not know whether it was the southeast quarter of the northwest quarter of some section, township and range; you would not know anything about it. Now, Congress has said that a man who pretends to know about those

things and know about the description of land, who undertakes for a reward to point out certain lands to a man, and he points out certain land and tells this man that that is a certain described section, congressional subdivision, and it is not that subdivision at all, -- why, he has violated the statute. Now, Congress leaves to the State of California the subject of punishing men for false representations concerning the quality of the soil or the quality of the water. So, gentlemen, if this tract of land up there where those sand-dunes are pictured, Mr. Rood's, and those hills, if he showed him that land and said, "Here is the land now you are going to enter", when it was not that land at all that he showed him, but some other flat, level, sandy soil, why then he committed a crime.

Now, I think I have made that plain to you. If the defendant told these people that the soil up here on this desert was equivalent to the soil in Mecca, that grows those beautiful date palms and the fine alfalfa, -- if he told them that, you have a right to take it into consideration in weighing the testimony, in comparing the testimony of Rood, for instance, with the defendant. If the defendant misrepresented the facts concerning the land, you cannot convict him for those misrepresentations, but you have got a right to take it into consideration when you come to weigh his testimony with the testimony of these other witnesses, and consider that if he made false representations in one regard, he may have made them in another.

Now, I am not intimating to you, gentlemen, how you shall decide this question. It is for you. You

are the exclusive judges of the facts and the credibility of the witnesses. You must accept the law as I state it to you, but when it comes to determining the facts, as to whether or not this man made misrepresentations as charged in the indictment, you are the exclusive judges of that. The law has divided our duty. Your duty is one thing, and mine is another.

In weighing the testimony of these witnesses, you shall take into consideration the reasonableness of what they said when they were on the witness-stand, their manner, conduct, their intelligence, and the interest they had in the matter, their prejudice, and all other things that may appeal to you to determine whether or not a man told the truth.

And when you come to consider the interest, I take it that you shall regard the testimony of these three men who are testifying here, their feelings in the matter, and you shall take into consideration the interest the defendant has in the suit, or the result of it, as to what influence that may have on his testimony, whether the interest that he has in the result of the suit is such as will tempt him to color, pervert or withhold the truth. And if any witness has wilfully testified falsely in this case, you have a right to disregard any part or all of his testimony.

Now, gentlemen, you have heard me instruct you before concerning a reasonable doubt. The indictment raises no presumption against the defendant. He is presumed to be innocent until the contrary is proven, and that presumption attends him throughout the trial and until he is proven guilty. You cannot convict the

defendant unless you are satisfied beyond a reasonable doubt of his guilt. In a civil suit you decide the case according to the preponderance of the evidence, but in a criminal case the evidence must show and satisfy you beyond a reasonable doubt, so that there is some difference in weighing the evidence and the weight it has in your reaching a verdict. Now, it is hard to tell what a reasonable doubt is, but there are some things that the courts have determined and juries are instructed concerning this reasonable doubt. It does not mean that all doubt is to be excluded. You cannot be absolutely certain of the things in this life. You must act upon the strong probabilities of the case; discard the unreasonable things about the evidence; act upon the things that you believe and can tie to and firmly believe, and the probabilities should be so strong as not to exclude all doubt, but to exclude reasonable doubt. If you have an abiding conviction that the defendant is guilty, it is your duty to convict; if you have not an abiding conviction, it is your duty to acquit.

Is there anything more, gentlemen, you would have me say to the jury or any exceptions to the charge?

(no response).

THE COURT: Swear a bailiff.

THE CLERK: You have not instructed them as to the form of verdict.

THE COURT: A form of verdict will be handed you, gentlemen. If you find the defendant guilty on either of the counts, you need not fill in the blank. If you find him not guilty, write in the word "not". Now,

there are three counts in indictment. You can find him guilty on one, two or three, or not guilty on one, two or three. Elect one of your number foreman, and when you shall have agreed upon a verdict, let the foreman sign it. You cannot return a verdict unless you concur therein. Swear a Bailiff.

(Whereupon a Bailiff was sworn to take charge of the Jury).

MR GREEN: May the Jury have the letters and agreements?

THE COURT: I suppose there is no objection to taking the exhibits, or any part of them, to the jury-room. And let them take the indictment.

MR GREEN: And the plats, if they desire, any and all of them.

MR W. S. ALLEN: If your Honor please, I did not hear any instruction to the Jury as to the special findings requested.

THE COURT: There is no practice of that kind.

MR W. S. ALLEN: Note an exception.

MR GREEN: One of the Jurors just suggested taking this map with them. It is not in evidence, but I am perfectly willing for it to go.

MR W. S. ALLEN: Certainly.

THE COURT: Give them to the Bailiff. Take the indictment, Mr. Bailiff.

THE CLERK: Are all these exhibits to go?

MR GREEN: Yes.

THE COURT: Follow the Bailiff, gentlemen.

(WHEREUPON THE JURY RETIRED IN CHARGE OF THE BAILIFF TO CONSIDER OF THEIR VERDICT)."

The above and foregoing contains that part of the proceedings had upon the trial upon which the defendant desires to appeal.

That following the conviction of the defendant on the second count of the indictment, the Court on October 25, 1920, regularly pronounced sentence upon the defendant and adjudged that under the conviction upon the second count of the indictment the defendant be imprisoned for the term of ten months in the Los Angeles County Jail.

Thereupon, to-wit, on October 25, 1920, the defendant in open court petitioned the Court for a writ of error, which said petition was thereupon granted and allowed by the Court and the Court thereupon fixed a supersedeas bond upon appeal in the sum of \$1000.00 to be duly given by the defendant.

That thereupon on the 25th day of October, 1920, a writ of error was duly issued in said cause, returnable before the United States Circuit Court of Appeals, for the Ninth Circuit.

That thereupon, upon said date, citation upon said writ of error was duly issued, served upon the United States District Attorney, and filed with the Clerk of said Court. The indictment, writ *or* error, citation on writ of error, assignment of error, and the various orders and proceedings of the Court referred to herein are fully set out in the printed transcript of record on appeal of the Clerk to be filed herein and ordered to be printed herewith.

And, for as much as the evidence and proceedings and matters of exception above set forth do not fully

appear of record, the defendant by his attorneys, tenders this bill of exceptions and prays that the same be signed and sealed by the Court herein, pursuant to the statute in such case made and provided.

Lawrence W. Allen

W. S. Allen

Hubert W. Swender

Attorneys for Defendant.

Defendant, T. M. Anderson, hereby presents the foregoing as his bill of exceptions herein and respectfully asks that the same may be allowed.

Lawrence W. Allen

W. S. Allen

Hubert W. Swender

Attorneys for Defendant.

To Robert O'Connor, Esquire, United States District Attorney for the Southern District of California:

You will please take notice that the foregoing constitutes and is the bill of exceptions from the defendant in the above entitled action, and the said defendant will ask for allowance of the same.

Lawrence W. Allen

W. S. Allen

Hubert W. Swender

Attorneys for Defendant.

Service of the foregoing bill of exceptions is hereby acknowledged this 16th day of November, 1920.

Milton Bryan

Assistant United States District

Attorney for the United States of

America.

It is hereby stipulated that the foregoing bill of exceptions is correct and that the same be settled and allowed by the Court.

Lawrence W. Allen

W. S. Allen

Hubert W. Swender

Attorneys for Defendant.

Robert O'Connor

United States Attorney.

The foregoing bill of exceptions having been duly presented to the Court, the same is hereby duly allowed and signed and made a part of the records in this cause.

Dated this 15 day of December, 1920.

Trippet

JUDGE

[Endorsed]: No. 2360 Criminal In the District Court of the United States of America In and for the Southern District of California Southern Division United States of America Plaintiff vs T. M. Anderson Defendant. Bill of Exceptions. Filed Dec 16 1920 at — min. past — o'clock — M. CHAS. N. WILLIAMS, Clerk Louis J. Somers Deputy Allen, Allen & Swender 620 Ferguson Bldg. Tel. 14463 Main 4463 Los Angeles, California Attorneys for Defendant

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

UNITED STATES OF)	
AMERICA,)	
)	
	)	Plaintiff,
vs.	)	No. 2360-Crim.
)	
)	
T. M. ANDERSON,	)	ASSIGNMENT
	)	OF ERRORS.
)	
	)	Defendant.
)	

Comes now T. M. Anderson, the defendant above named, and files the following statement and assignment of errors, upon which he will rely in the prosecution of a writ of error upon the above entitled cause.

I.

The Court erred in overruling defendant's objection to the following question, propounded by plaintiff to the witness A. A. Wilhelm: (Page 4 of Reporter's Transcript.)

"Q BY MR GREEN: Just describe the land, Mr. Wilhelm, - the character of the soil in there, Mr. Wilhelm?

"MR W. S. ALLEN: Objected to as being irrelevant and immaterial.

"THE COURT: Overruled."

II.

The Court erred in overruling defendant's objection to the following question propounded by plaintiff to

the witness A. A. Wilhelm: (Page 6 of Reporter's Transcript.)

"Q At least that. Now, you have called attention to a meandering line there. Take the northeast quarter; what does that represent? Referring to the northeast quarter of Section 8, now, what does that meandering line represent?

A A division of the land which has a surface soil and a land which has no surface soil.

MR W. S. ALLEN: If the Court please, we object to this question and answer on the ground that it is incompetent, irrelevant and immaterial. It is a conclusion of this witness as to what the contour or surface of this land may be, and what it is useful for, and how much of it could be used. On the further ground that it does not prove or tend to prove any issues in this case, the question being whether he was shown this land, or not.

THE COURT: Well, I don't know whether the evidence is material at the present time. I think it is relevant, but I think this witness might be further qualified as to give his opinion concerning the character of the soil.

MR GREEN: Yes, sir; we intend to do that just as soon as we get through with the description.

THE COURT: Objection overruled.

MR W. S. ALLEN: If the Court please, our objection goes to that, that it is immaterial as to the character of the soil.

THE COURT: Well, I don't know. The character of the soil sometimes is important in

the case for the purposes of showing that a man could not be fooled or that he could be fooled. I will overrule the objection.

MR W. S. ALLEN: May I make the further objection, your Honor, that under the pleadings in this case the character of the soil is not brought in question. The question is whether he was shown this particular section of land.

THE COURT: Yes. Well, that may be so, but it would assist or tend to show that the man was intending to perpetrate a fraud. Fraud is involved here. I will overrule the objection.

MR W. S. ALLEN: Exception."

III.

The Court erred in overruling defendant's objection to the following question propounded by plaintiff to the witness A. A. Wilhelm: (Page 7 of Reporter's Transcript.)

"Q BY MR GREEN: Now, approximately how much land in the northeast quarter of that Section could be cultivated for any purpose?

MR W. S. ALLEN: Objected to on the ground that no proper foundation has been laid for it.

Q BY MR GREEN: Are you familiar with all the land in that district, and its particular soil and what it produces?

A I am.

Q BY THE COURT: How long have you been acquainted with lands of that character?

A Oh, for ten years.

Q And do you know what land in that neighborhood can be cultivated and what land cannot be cultivated?

A I do.

Q Do you know what lands will grow and what they will not grow? What lands will grow things and what will not grow?

A I do.

Q Have you been making a study of it for ten years?

A I have.

THE COURT: The objection will be overruled.

ME W. S. ALLEN: If the Court please, we will enter an objection to all those questions on the ground that they are incompetent, irrelevant and immaterial.

THE COURT: Well, the objection is overruled.

MR W. S. ALLEN: An Exception, please."

IV.

That the Court erred in overruling defendant's objection to the following question propounded by plaintiff to the witness A. A. Wilhelm: (Page 9 of Reporter's Transcript.)

"Q As to the east half of Section 8, what are the water conditions there, if you know?

MR. L. W. ALLEN: Now, if your Honor please, we object to that question on the ground that it is incompetent, irrelevant and immaterial,

and makes no difference whether there is any water there, or not.

THE COURT: Well, I think it might make a great deal of difference.

MR GREEN: I should say it would.

THE COURT: Whether a man wanted to buy it or not, or enter it.

MR L. W. ALLEN: Well, that is so, too, your Honor, but the question in this case is, first, was it the Government land, and, second, was the man shown this land?

THE COURT: Yes; and he was shown land for the purposes of getting money out of him to locate it. Now, if you locate a man -- show a man a good forty acres and say, "This is a certain described forty acres," and it looks good to him, he is liable to put up money; but if it is all rock and hill, he is not liable to put up money. There is where the fraud comes in.

MR L. W. ALLEN: Certainly.

THE COURT: Objection overruled.

MR L. W. ALLEN: Exception, please.

A Along the east line of each of these quarter sections water might be developed in wells in sufficient quantities for irrigation purposes.

MR W. S. ALLEN: Objected to, if the Court please, as calling on this man's imagination -- a mere conclusion of the witness. Wells might be drawn anywhere.

THE COURT: The objection will be overruled.

MR W. S. ALLEN: Exception."

V.

The Court erred in refusing to give the following instruction requested by the defendant:

“DEFENDANT’S INSTRUCTION NO. 2.

The Court instructs you that any representation made by the defendant as to the quality of the land shown, or as to the nature of the land shown, or as to what the land shown could produce, or as to whether water for irrigation or domestic use could be developed or found upon the land shown, is not a representation of the “particular surveyed description” of the land so shown.”

VI.

That the Court erred in refusing to give the following instruction requested by the defendant:

“DEFENDANT’S INSTRUCTION NO. 6.

The Court instructs you that if you shall believe from the evidence that the defendant Anderson showed Mr. Rood the land upon which the defendant Anderson filed him, then the defendant is not guilty of any violation of Chap. 115, Act of Feb. 23, 1917, and you will therefore return a verdict of “not guilty” upon the second count of the indictment.”

VII.

That the Court erred in refusing to give the following instruction requested by the defendant:

“DEFENDANT’S INSTRUCTION NO. 8.

“The Court instructs you that even if you shall believe from the evidence that the defendant An-

derson made false representations to Zsinko, and to Rood and to O'Hagan as to the quality of their respective land, or as to what their lands would produce, or as to the number of acres thereof which were inundated by the waters of the Salton Sea, or as to whether water for irrigation or domestic use could be produced upon their land; if nevertheless and notwithstanding such representations just enumerated you shall believe that the defendant showed Zsinko, Rood and O'Hagan respectively the land upon which the defendant located them, then your verdict will be "not guilty" upon each of the three counts to the indictment."

VIII.

That the Court erred in instructing the jury as follows: (Page 15, lines 4 to 11, Reporter's Transcript.)

"If the defendant misrepresented the facts concerning the land, you cannot convict him for those misrepresentations, but you have got a right to take it into consideration when you come to weigh his testimony with the testimony of these other witnesses, and consider that if he made false representations in one regard, he may have made them in another."

IX.

That the Court erred in refusing to request the jury to make a special finding on the following question:

“Did the defendant Anderson take Mr. Rood onto the land and show him the land upon which the defendant filed him.

Answer: ”

AND, upon the foregoing Assignment of Errors and upon the Bill of Exceptions, and upon the record in said case, the defendant prays that the verdict and judgment rendered therein may be reversed.

Dated this 25th day of October, 1920.

Lawrence W. Allen

W. S. Allen

Hubert W. Swender

Attorneys for Defendant.

We hereby certify that the foregoing assignment of errors is made in behalf of the petitioner for writ of error, and is, in our opinion, and the same now constitutes, the assignment of errors upon the writ prayed for.

Lawrence W. Allen

W. S. Allen

Hubert W. Swender

Attorneys for Defendant.

[Endorsed]: No. 2360 – Crim. DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION UNITED STATES OF AMERICA, Plaintiff, vs. T. M. ANDERSON, Defendant. ASSIGNMENT OF ERROR Filed Nov 16 1920 at — min past — o'clock — M CHAS. N. WILLIAMS, Clerk Louis J. Somers, Deputy

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

United States of America	}	CLERK'S OFFICE
Plaintiff		
vs	}	No. 2360 Crim.
T. M. Anderson		
Defendant	}	PRÆCIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue a certified transcript of the following matters and documents or copies thereof, including endorsements, upon Writ of Error, to the United States District Court for the Southern District of California, Southern Division, to wit:

1. The Judgment Roll
2. Petition for Writ of Error
3. Assignment of Errors
4. Order allowing Writ of Error
5. Writ of Error
6. Citation to the United States of America on Writ of Error
7. Certificate of Clerk of the United States District Court, to Record

8. Bill of Exceptions

9. Praecipe

Lawrence W. Allen

W. S. Allen

Hubert W. Swender

Attorneys for Defendant.

[Endorsed]: Original *No.* 2360 Crim. U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA United States of America Plaintiff vs T. M. Anderson Defendant PRÆCIPE FOR Filed Dec 16 1920 at — min. past — o'clock — M Chas N. WILLIAMS, Clerk Louis J. Somers Deputy.

No. 3635

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

T. M. Anderson,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

ALLEN, ALLEN & SWENDER,
Attorneys for Plaintiff in Error.

FILED

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IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

T. M. Anderson,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

The point upon which the defendant relies chiefly for a reversal of the judgment herein is this: That throughout this case testimony has been dragged in over defendant's objection as to the quality of the land, that is, as to whether the land was suitable for cultivation and as to whether water might be developed on it in sufficient quantities for irrigation. Evidence produced by the plaintiff showed that the greater portion of the land was hill and rock, and that water *might* be found along the eastern *line* of the land, upon the level portion thereof, in sufficient quantities for irrigation.

Defendant's contention is that it was this evidence as to the unsuitability of the land for agricultural purposes that resulted in the conviction.

The truth of the matter may have been, and very probably was, that the entryman Rood desired to enter the land and prove up on it, because of his belief that it was oil-bearing land.

Or it may have been that he believed the hills there contained certain minerals and for that reason he desired the land. Or perhaps he desired it for a quarry to produce certain rock found thereon to be used in connection with highway construction in that or nearby parts of the county.

The motives of Rood in entering the land were things that no skill or amount of cross-examination could have dragged from him. Rood, by showing that for the most part the land was unsuitable for agricultural purposes, thus led the jury to believe that it was for agricultural purposes that he had entered it, and therefore the jury was led to believe that the defendant Anderson had therein deceived him and had thereby transgressed the law. It was objected by the defendant throughout the case, as is shown by the bill of exceptions and the specifications of error, that the quality of the soil, and its suitability for agricultural purposes, was not an issue in the case. It is true enough that the court did instruct the jury that the statute does not make it a crime to misrepresent the character of the soil. But the jury, very likely on the theory of "*falsus in uno, falsus in omnibus*," believed that, since the defendant had misrepresented the adaptability of the soil for agricultural purposes, most likely

he had misrepresented the surveyed description of the land.

Our contention is, as stated before, that Rood's motives for desiring to locate a certain piece of land are something that no cross-examination can elicit, unless Rood should so choose. The mere fact that the greater portion of the land was unsuitable for agricultural purposes does not show or prove that Rood did not enter the land for an entirely different purpose.

Throughout the case it was defendant's contention that quality of the soil was immaterial. Yet the testimony was permitted despite this objection. In the instructions requested by defendant it was sought to show that, no matter what was the quality of the soil, or no matter what had been the representations of the defendant concerning it, the real issue was this: Was Rood actually shown the land upon which the defendant filed him?

The defendant sought to overcome the prejudice done him in admitting this testimony by requesting defendant's instructions Nos. 2, 6 and 8, all of which were refused by the court. The refusal of the court to give these instructions is set out in sections V, VI and VII of the assignment of errors. [Transcript of Record, p. 60.]

We believe the defendant was entitled to these instructions. And we do not believe that the instruction given by the court, although it very nearly substantially covered the substance of these requested instruc-

tions, was sufficient to protect the rights of the defendant. We think that the court's instruction was not clear, that is, the law of the case was smothered in too many words. If the defendant was entitled to these instructions at all he was entitled to them in succinct, clear-cut instructions that "hit the nail on the head."

It is true enough that the court is not bound to give the instructions in exactly the form requested by the defendant, and that it is sufficient if they are given substantially. But in this case the question covered by the instructions requested by the plaintiff was the bone of contention throughout the case—and is not practically the only question to be considered on this appeal.

Defendant's complaint now would not be so bitter if proper instructions had not been submitted and requested by him. But the fact is that they *were* submitted. And that they *were* proper hardly admits of argument. And the fact that they were not given is what hurts.

An attorney studies his case for weeks in advance of the trial. The trial judge rarely has opportunity to examine a case—seldom studies it except during the course of the trial. When an attorney prepares an instruction he does so only after careful thought and with painstaking care as to the proper wording needed to convey the exact meaning intended. It is very seldom that a judge can deliver *extempore* to the

jury, and without reference to notes, an instruction that will cover the points of law as ably as will an instruction prepared by the attorney, assuming, of course, that the instruction so prepared is a proper one.

We believe that, if the jury had been instructed briefly and succinctly, exactly upon the point of law involved, the verdict would have been a different one. We believe that the defendant was prejudiced by the discussion given in the court's instruction, which although not faulty in substance perhaps, still did not "hit the nail on the head." The instructions prepared by defendant were brief, yet full; carefully worded, but nevertheless absolutely fair. Other things being equal, we believe that they should have been preferred. Then there could have been *no* argument!

Counsel for defendant were appointed by the court to defend the defendant in the trial court because of defendant's lack of means to hire attorneys for his defense. The defendant has managed by one way or another to pay counsel a meager fee for prosecuting this appeal. But it is only our faith in the justice of defendant's cause that has moved us to undertake it. The outcome of this appeal is fraught with much concern to the defendant. It means disgrace, or vindication and a new trial.

As officers of the court we do not hesitate to say that, had defendant's instructions been given, the defendant would in our opinion have been acquitted.

But one further specification of error need be considered. Referring to defendant's assignment of errors

IX [Transcript of Record, bottom of p. 61]. Although we know of no Federal statute providing for a special finding by the jury on a particular question, nevertheless, on the other hand, we know of no statute prohibiting such a practice. Such a finding is provided for by law in the state courts, not only in California but also in most of the states if not all of them, and we see no reason why defendant's request for a special finding should not have been permitted here.

The request for this special verdict was the final and concluding attempt of defendant's counsel to protect the defendant from the prejudicial effect of evidence which was admitted over objection. The jury, when faced squarely with the necessity of answering this question, would then have stopped to ponder about as follows: "Now if this man Anderson did actually take Rood onto the land and show it to him, telling him at the time that this was the land that he was going to file him on, and then Rood did actually file on the land, why, I do not see how any representations, whether true or false, as to the character of the soil or its productivity, could make any difference—Rood must have taken it with his eyes open, and if the land did not turn out to be what Rood wanted, I don't see that that is any reason for us to find Anderson guilty of misrepresenting the location of the land."

We believe the question would have materially aided the jury in analyzing its verdict.

The following is the opinion of former Chief Justice Beatty of the purpose and merit of the special

verdict (quoting from 152 Cal. 125, second paragraph on page 130 thereof):

“It is perhaps unnecessary under the circumstances to say that the ruling was based upon an evident misconception of the sole purpose of the then recent amendment to section 625 of the Code of Civil Procedure making the submission of special issues and particular questions of fact, when properly requested, compulsory in all cases tried by jury.

“It is of course true, but no truer today than it always has been, that a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense, and the very purpose of special findings is to test the validity of the general verdict by ascertaining whether or not it may have been the result of a misapplication of the law to actual findings in material conflict with the findings which in their absence would be implied from the general verdict. In other words, the response of the jury to the special issues or particular questions of fact may show that no judgment can properly be entered in favor of a plaintiff upon a general verdict because the jury had not found in his favor upon some material issue, or has found against him as to some fact fatal to his cause of action, and in case of a general verdict for a defendant the special findings, together with the facts admitted on the record, may show that the plaintiff is entitled to a judgment notwithstanding the general verdict against him. These are but illustrations of a great variety of cases,

frequently occurring, in which special findings would show that a general verdict is a verdict against law, upon which it would be the duty of the court either to enter no judgment at all because the findings were insufficient to support a judgment for either party, or because the party against whom the general verdict was returned would be entitled to a judgment *non obstante*. The Legislature, recognizing these conditions, and in view of the great and growing difficulty which jurors encounter in the effort to apply to facts—plain enough in themselves—the law given to them in the form of voluminous instructions abounding in nice distinctions, often imperfectly stated, and of doubtful meaning even to those who have had the advantage of professional training, has wisely determined that upon the proper request of either party to an action the court *must* direct the jury if they return a general verdict to give answers to any material question, or questions of fact, which will enable the court, in the exercise of its proper functions, to apply the law to the real facts of the case as they have been actually found, instead of recording a judgment wholly unsupported by the facts. It is not a question with the courts whether this law should be enforced, but some question seems to be made whether it should be liberally construed and applied, or narrowly construed, and hampered in its application on account of the inconveniences which it is supposed to involve. The most serious fault imputed to it is that its enforcement will often result in mistrials on account of the inability of

jurors to agree upon the facts necessary to support their general verdicts. This, so far from being a fault, is to my mind the crowning virtue of the amendment referred to, as it is its sole justification. Jurors are not supposed to be skilled in the interpretation of the law, and they may often make mistakes in applying it to a given state of facts, but the concurring judgment of twelve men as to the effect of conflicting evidence upon an issue of fact is accorded great weight and is generally conclusive. If in any case a jury is unable to find that a material fact has been proved, no man should be allowed to profit or be condemned to suffer by the implied existence of such fact, resulting from the return of a general verdict; and if a fact has been proved fatally at variance with their general verdict, no man should gain or lose by the necessity of inferring its non-existence in the absence of a specific finding. In either case the worst effect of the due operation of the amended statute would be the immediate and just award of a new trial, while the result of its non-enactment, or the failure to apply it, would be, at best, an order for a new trial, after a long and troublesome proceeding, and at the worst a cruel and irremediable injustice to the losing party consequent upon the refusal of a new trial. Between these alternatives it is difficult to suppose that any tribunal, legislative or judicial, could hesitate which to choose. I at least, speaking from long experience as a trial judge and member of courts of review, am firmly convinced that the amended law was wisely enacted, and that its operation, if liberally con-

strued and freely applied, as all remedial statutes should be, especially in matters of procedure, will be to prevent many miscarriages of justice, at the same time that it will eliminate much of the trouble and delay hitherto experienced in disposing of motions for new trials based upon the ground that the verdict is against the evidence.”

In the case at bar the general verdict of guilty upon the Rood count implied a finding in favor of the plaintiff of every fact essential to the support of the charge, and it was the purpose of defendant in requesting the special verdict to require an answer to a question which is answered favorably to the defendant would show that the jury, while it had not found against the defendant upon a separate element of the case, nevertheless had rendered a “lump” verdict against him which might conceal some mental reservations. Had the special verdict requested been answered by the jury in the affirmative, the general verdict of guilty could not have stood.

In the absence of any practice or statute relating to such a request to the jury for a special verdict upon the question submitted by the defendant, we believe that the language of Justice Taggart states the theory upon which the trial judge in the case at bar should have permitted defendant’s request. Quoting from 12 Cal. App. 207, beginning on page 214 thereof:

“We do not regard the analogy between a request for instructions and a request for the submission of special interrogatories so close as to

justify the application to the latter of a rule of practice adopted in connection with the former. Neither does the reason underlying the general rule of practice relating to the time for presenting instructions appear to us to apply with the same force to the matter of requesting special issues to be submitted. While we agree with respondent's position that this is a matter resting largely in the discretion of the trial judge where there is neither rule of practice nor statute relating to it, we are not prepared to say that under the circumstances of this case the trial judge was justified in refusing to submit these issues solely upon the ground that the request for submission was not made in time. It has been held that in the matter of presenting instructions for the jury where there is no rule in regard to the matter a party would have a right to submit his instructions at any time before the jury leaves the box. (*People v. Williams*, 32 Cal. 280, 286.) And even rules applying to such matters should be framed and applied in the furtherance of justice and not strictly adhered to where such adherence would work the opposite result (page 287).

"The special findings which the parties were entitled to have made by the jury under the provisions of section 625, Code of Civil Procedure, as that section read and was interpreted when this case was tried, were not the special verdict of the common-law practice which must be sufficient to support a judgment, but their primary purpose was to determine whether the general verdict was or was not against law. (*Larsen v.*

Leonardt, 8 Cal. App. 226, 228 (96 Pac. 395).) They were addressed to matters relevant to the essential issues impliedly found by the jury in reaching a general verdict, and were subject to two conditions:

“1. Is the question so framed as to admit of a plain and direct answer? and, 2. Would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary?”

And for these reasons we ask that the judgment be reversed. If such should be the judgment of the Appellate Court we are thoroughly of the belief that an innocent man will be acquitted in a new trial of the issue.

ALLEN, ALLEN & SWENDER,
Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

T. M. Anderson,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
United States of America,	}
<i>Defendant in Error.</i>	

ANSWERING BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
United States Attorney.
T. F. GREEN,
Assistant United States Attorney.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

T. M. Anderson,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

ANSWERING BRIEF OF DEFENDANT IN ERROR.

I.

Appellant objects to the testimony describing the lands. The indictment charges a violation of chapter 115, Act February 23, 1917, which provides that

“Any person who for a reward paid or promised shall undertake to locate for an intending purchaser, settler or entryman any public lands of the United States subject to disposition under the public land laws, and who shall wilfully and falsely represent to such intending purchaser, settler or entryman that any tract of land shown to him is public land of the United States, sub-

“ject to sale, settlement or entry, or that it is of
“a particular surveyed description, with intent to
“deceive the person to whom such representation
“is made, or who in reckless disregard of the truth
“shall falsely represent to any such person that
“any tract of land shown him is public land of
“the United States, subject to sale, settlement or
“entry, or that it is of a particular surveyed de-
“scription, thereby deceiving the person to whom
“such representation is made, shall be deemed
“guilty of a misdemeanor and shall be punished,”
etc.

39 Stat. 936, U. S. Compiled Stat. 1918, Sec.
10226a. ¹

The particular violation in the second count of the indictment, upon which count only appellant was convicted, alleges that appellant

“ * * * did knowingly, wilfully and unlawfully, and
“for a promise of reward of four hundred eighty
“dollars (\$480.00), represent to an intending settler
“and entryman, to-wit: one Emerson J. Rood, that a
“certain tract of land shown to the said Emerson J.
“Rood at said time and place by the said T. M. Ander-
“son was public land of the United States, subject to
“sale, settlement and entry, and did undertake to locate
“said Emerson J. Rood on said land; and the said
“T. M. Anderson further represented to the said Emer-
“son J. Rood that the said land so shown to the said
“Emerson J. Rood was of a particular surveyed de-
“scription, to-wit: East half of section 8, township 8
“south, range 11 east, S. B. M., with the intent on the
“part of the said T. M. Anderson to deceive the said

“Emerson J. Rood, to whom said representations were made, and the said Emerson J. Rood was then and there deceived by the said representations, and did pay to the said T. M. Anderson as a consideration for his services in undertaking to so locate the said Emerson J. Rood on said land, the sum of four hundred eighty dollars (\$480.00), the said T. M. Anderson then and there well knowing that the land so shown to the said Emerson J. Rood was not public land of the United States subject to sale, settlement and entry, and that the land so shown to the said Emerson J. Rood was not the east half of section 8, township 8 south, range 11 east, S. B. M., but on the contrary was a part of the northeast quarter of section 17; a part of the south half of section 9, and a part of the northwest quarter of section 16, township 8 south, range 11 east, S. B. M. Contrary,” etc.

One of the principal issues in this case was the identity of the lands in question. Anyone not an expert would have difficulty in telling what section or portion of a section a certain tract of land was located in. But anyone who had lands pointed out to him could describe its physical features, character of soil, etc., and thus identify it. In this case, in order to show and identify the lands alleged to have been pointed out by appellant to Rood, it was proper to have a description of the surface, contour, soil and its position with relation to any natural monuments presented in the evidence; and to establish that such land so pointed out was not the lands appellant caused Rood to enter, the description of the lands so entered, that is, the physical

appearance and condition and location with reference to natural monuments, was not only relevant, competent and material, but was necessary evidence. Any description of the land which would serve in any way to identify it was proper evidence.

I Wigmore on Evidence, sections 411, 412, 415, 433, 434.

II.

The evidence of what appellant told Rood about the quality of the soil and its suitability for agricultural purposes was also admissible upon three other grounds:

a. It is charged in the indictment that appellant had the intent to deceive Rood, and this is one of the elements of the offense, as it is defined in the statute. Every act and word of appellant to Rood, or, for that matter, every act or word that appellant caused anyone else to communicate to Rood with the purpose of causing Rood to close the negotiations for the land and pay him the money, was relevant and admissible to show appellant's intent. If he misrepresented the soil or its adaptability to any use, this was pertinent and competent evidence of his intent. This is elementary.

16 C. J., p. 565, Sec. 1096.

b. All of the things done and said between the parties during the consummation of the transaction was *res gestae*, and consequently relevant, competent and material. This is elementary.

16 C. J., p. 572, Sec. 1114.

c. Where a part of a conversation is admissible, the whole of it is admissible. This is elementary.

16 C. J., p. 634, Sec. 1263.

The court very carefully limited the effect of this evidence in his instructions. [Tr. pp. 45 to 49.]

III.

Appellant's objection to the instructions of the court is not that they do not correctly state the law, but that the "law of the case was smothered in too many words." The court's instructions are not open to this charge. The court is not under obligation to give instructions prepared by attorneys even though such instructions "hit the nail on the head." The instructions proposed by appellant [Tr. pp. 43-44] are fully, and more clearly, and better covered by the instructions given by the court. [Tr. pp. 46 to 48.] There is no error in this respect. This proposition is so well settled that no citation of authorities is necessary.

IV.

The issue in a criminal trial is "guilty or not guilty." The jury has a right, if it so desires, to render a special verdict, but the court will not instruct it so to do, as this would be error.

1 Bishop's New Crim. Proc., Secs. 1006 to 1007.

The Criminal Code of California provides for a special verdict where the jury is in doubt as to the legal effect of the facts found.

Cal. Penal Code, Secs. 1150, 1152, 1153, 1154, 1155.

But, even under this procedure, it would be error to instruct the jury to return a special verdict as requested in the case at bar. The court could have told the jury that they might return a special verdict if they saw fit, and were unable to agree as to the law and facts both; but even then the jury would have been entitled to return a general verdict if they so desired.

People v. Antonio, 27 Cal. 404, 408.

This practice is not followed in the Federal courts, and there was no error in the court's refusal of appellant's request for a direction of a special verdict.

It is the jury, and not the defendant, who has the right to resort to a special verdict. In the case at bar the jury was able to agree upon a general verdict and there was, therefore, no cause for a special verdict.

There is no error in the record and the judgment of the court below should be affirmed.

ROBERT O'CONNOR,

United States Attorney.

T. F. GREEN,

Assistant United States Attorney.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BENJAMIN KATHRINER and JAMES SULLI-
VAN,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

FILED
JUL - 2 1921
F. D. MONCKTON,
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

BENJAMIN KATHRINER and JAMES SULLIVAN,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Francisco, Cal.

For Defendants and Plaintiffs in Error:

FRANK J. HENNESSEY, Esq., San Francisco, Cal.

UNITED STATES OF AMERICA.

District Court of the United States, Northern
District of California.
Clerk's Office.

No. 8432.

THE UNITED STATES OF AMERICA

vs.

BENJAMIN KATHRINER and JAMES SULLIVAN.

Praecipe for Transcript of Record.

To the Clerk of said Court:

Sir: Please prepare the transcript of record upon writ of error in the above-entitled cause:

1. Information.
2. Arraignment and demurrer filed by defendants.
3. Order overruling demurrer.
4. Plea of defendant.
5. Record of trial.
6. Verdict of jury.

7. Judgment of court.
8. Motion for a new trial and in arrest of judgment.
9. Order denying same.
10. Clerk's certificate to judgment-roll.
11. Petition for writ of error on behalf of defendants.
12. Assignment of errors on behalf of defendants.
13. Citation on writ of error.
14. Return thereto.
15. Order allowing writ of error and supersedeas.
16. Supersedeas bond of defendants. [1*]
17. Bill of exceptions.
18. Clerk's certificate to transcript of record.

FRANK J. HENNESSY,
Attorney for Defendants.

[Endorsed]: Filed Jan. 19, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

(No. 8432.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES F. SULLIVAN and BEN J.
KATHRINER,

Defendants.

Information.

At the March term of said court in the year of our Lord one thousand nine hundred and twenty,—

BE IT REMEMBERED that Annette Abbott Adams, United States Attorney for the Northern District of California, by and through Albert M. Hardie, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 21st day of May, 1920, and with leave of said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is, hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents:
THAT

JAMES F. SULLIVAN and BEN J. KATRINER hereinafter called the defendants heretofore, to wit, on the 23d day of April, 1920, at San Francisco, in the County of San Francisco, in the Southern Division [3] of the Northern District of California, after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect, did, unlawfully, wilfully and knowingly, in violation of Section 21 of Title II of the Act of October 28, 1919, known as the "National Prohibition Act, maintain a common nuisance in that they did unlawfully, wilfully and knowingly keep on the premises situated at 1123 Folsom Street certain intoxicating liquor, to wit, about one quart brandy containing one-half of one per cent or more of alcohol by volume.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And affiant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth each of which your informant avers and verily believes to be true are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents:
THAT

JAMES F. SULLIVAN and BEN J. KATRINER hereinafter called the defendant, heretofore, to wit, on the 23d day of April, 1920, at San Francisco, in the Southern Division of the Northern District of California, after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect, did then and there, in violation of Section 3 of Title II of the Act of October 28th, 1919, known as the National Prohibition Act, did, unlawfully, wilfully and knowingly have in their possession for beverage purposes, certain intoxicating liquor, to wit, about one quart brandy [4] containing one-half of one per cent or more of alcohol by volume.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

ANNETTE ABBOTT ADAMS,

United States Attorney.

ALBERT M. HARDIE,

Assistant U. S. Attorney,

Attorneys for Plaintiff. [5]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

John F. Hanley, being duly sworn, deposes and says: That on April 23d, 1920, James F. Sullivan and Ben J. Katriner at San Francisco, California,

had in their possession for beverage purposes and did maintain a common nuisance in that they kept on the premises at number 1123 Folsom Street certain intoxicating liquor, to wit, about one quart brandy containing one-half of one per cent or more of alcohol by volume, as set out in the foregoing information.

JOHN F. HANLEY.

Subscribed and sworn to before me, this 24th day of April, 1920.

[Seal]

C. M. TAYLOR,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed May 21, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [6]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Friday, the twenty-first day of May, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN F.
KATHRINER,

Minutes of Court—May 21, 1921—Arraignment, etc.

On motion of A. M. Hardie, Esq., Asst. U. S. Atty., and presenting information therefor, charging James F. Sullivan and Ben F. Katriner, jointly, with a violation of the Act of October 28, 1919, the Court ordered that said information be filed and made a record of this court, that warrants issue forthwith for the arrest and appearance of said defendants and that bonds for the release of said defendants be fixed in the sum of \$500.00 each. Thereafter said defendants were present in court with attorney F. J. Hennessey, Esq., and duly arraigned upon said information, whereupon the Court ordered that this case be continued to May 25, 1920, for entry of defendants' pleas. [7]

In the District Court of the United States, in and for the Southern Division of the Northern District of California.

No. 8432.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES F. SULLIVAN and BENJAMIN
KATHRINER,

Defendants.

(Demurrer to Information.)

Now come the defendants and demurring to the

information on file herein, for grounds of demurrer allege:

1. That said information does not state a public offense against these defendants, or either of them.

WHEREFORE, defendants pray that said information be dismissed and they be discharged.

FRANK J. HENNESSY,
Attorney for Defendants.

[Endorsed]: Filed May 25, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 8432.

THE UNITED STATES

vs.

JAMES F. SULLIVAN et al.

(Order Overruling Demurrer.)

FRANK J. HENNESSY, Esq., Attorney for Defendants.

ANNETTE ABBOTT ADAMS, United States Attorney, and ALBERT M. HARDIE, Esq., Assistant United States Attorney, Attorneys for the United States.

ON DEMURRER TO INFORMATION.

The demurrer to the information herein is overruled.

June 21st, 1920.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 21, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [9]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the third day of July, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN. J.
KATRINER.

Minutes of Court—July 3, 1920—Pleas of Defendants, etc.

In this case the defendants were present in court with attorney, and duly arraigned upon the information filed herein, stated their true names to be as contained therein, waived formal reading thereof, and thereupon each of said defendants plead "Not Guilty" of the offense charged therein against him, which pleas the Court ordered and the

same are hereby entered. After hearing A. M. Hardie, Esq., Asst. U. S. Atty., the Court ordered that this case be continued to July 26, 1920, to be set for trial. [10]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Thursday, the twenty-third day of September, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER,

Minutes of Court—September 23, 1920—Trial.

This case came on regularly this day for the trial of said defendants, who were present with attorney, Frank J. Hennessey, Esq. A. M. Hardie, Esq., Asst. U. S. Atty., was present on behalf of the United States. Upon the calling of the case, all parties answering ready for trial, the Court ordered that the same do proceed and that the jury-box be filled from the regular panel of trial jurors of this Court. Accordingly the hereinafter named persons were duly

drawn by lot, sworn, examined, accepted and sworn to try said defendants, viz.:

Alexander S. Ireland,	F. W. Gerlash,
Louis B. Gorgers,	William R. Pentz,
Andrew Armstrong,	A. W. Dollard,
Edwin R. Jackson,	E. H. Jones,
E. R. Brady.	John C. Bateman,
Benj. E. Lasky,	T. E. Flynn,

Mr. Geis made statement to the Court and jury of the nature of the case and called V. H. De Spain, J. F. Hanley, R. F. Love, J. Copestake and A. M. Hardie, each of whom was duly sworn and examined on behalf of the United States and introduced in evidence 3 bottles and contents which were filed and marked United States Exhibits No. 1, and thereupon rested case on behalf of the United States. [11]

Mr. Hennessey thereupon moved the Court for an order instructing the jury to return a verdict of Not Guilty as to each defendant herein, which motion the Court ordered and the same is hereby denied, to which order Mr. Hennessey entered an exception. Mr. Hennessey thereupon submitted case on behalf of each defendant. The case was then argued by Mr. Hennessey and Mr. Geis and submitted; whereupon the Court proceeded to instruct the jury herein, who after being so instructed retired at 4 o'clock P. M. to deliberate upon a verdict and subsequently returned into Court at 4:50 o'clock P. M., and upon being called twelve (12) jurors answered to their names, and in answer to question of Court, stated that they had agreed upon a verdict, and presented a written verdict which the Court ordered filed and re-

corded, viz.: "We, the Jury, find James F. Sullivan and Ben J. Kathriner the defendants at the bar Guilty on the first count, Not Guilty on Second Count. Wm. R. Pentz, Foreman." Thereupon the Court ordered that the jurors herein be discharged from further consideration of this case and excused from attendance upon the Court until September 24, 1920, at 10 o'clock A. M., and that E. R. Brady be excused until September 27, 1920, at 10 o'clock A. M. After hearing the respective attorneys, the Court ordered that this case be continued to September 25, 1920, for judgments. [12]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER.

(Verdict.)

We, the jury, find James F. Sullivan and Ben J. Katriner, the defendants at the bar, Guilty on the first count, Not Guilty on second count.

W. R. PENTZ,
Foreman.

[Endorsed]: Filed Sept. 23, 1920, at 4 o'clock and 50 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [13]

In the District Court of the United States, in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

BENJAMIN KATHRINER and JAMES SULLIVAN,
LIVAN,

Defendants.

Motion for New Trial.

Now come Benjamin Kathriner and James Sullivan, the defendants in the above-entitled cause, and by Frank J. Hennessy, their attorney, move the Court to set aside the verdict rendered herein and to grant a new trial of said cause, and for reasons therefor shows to the Court the following:

1. That the verdict in said cause is contrary to the law of the case.

2. That the verdict in said cause is not supported by any evidence in the case.

3. That the Court upon the trial of said cause admitted incompetent evidence offered by the United States of America.

4. That the Court improperly instructed the jury to defendant's prejudice.

BENJAMIN KATHRINER,
JAMES SULLIVAN,

Defendants.

By FRANK J. HENNESSY,
Attorney for Defendants.

[Endorsed]: Receipt of a copy of within motion this 25th day of September, 1920, is hereby admitted.

FRANK M. SILVA,
United States District Attorney.

Filed Sep. 25, 1920. W. B. Maling, Clerk. By C.
W. Calbreath, Deputy Clerk. [14]

In the District Court of the United States, in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

BENJAMIN KATHRINER and JAMES SUL-
LIVAN,

Defendants.

Motion in Arrest of Judgment.

And now after verdict against the said defendants and before sentence, come the said defendants in their proper persons and by Frank J. Hennessy, their attorney, and move the Court here to arrest judgment herein and not pronounced sentence for the following reasons:

1. That the defendants have not nor has either of them ever been indicted by any grand jury of the offense charged in the information filed herein.

2. That the first count of the information filed herein does not charge or state facts sufficient to constitute a public offense under the laws of the United

States against these defendants or either of them.

BENJAMIN KATHRINER,
JAMES SULLIVAN,

Defendants.

By FRANK J. HENNESSY,
Attorney for Defendants.

[Endorsed]: Receipt of a copy of within motion
this 25th day of Sept. 1920, is admitted.

FRANK M. SILVA,
United States District Attorney.

Filed Sep. 25, 1920. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [15]

At a stated term of the District Court of the United
States, for the Northern District of California,
First Division, held at the courtroom thereof, in
the City and County of San Francisco, State of
California, on Saturday, the twenty-fifth day of
September, in the year of our Lord one thousand
nine hundred and twenty. Present: The Hon-
orable, MAURICE T. DOOLING, Judge.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER.

**Minutes of Court—September 25, 1920—Order De-
nying Motion for New Trial and Motion in
Arrest of Judgment, etc.**

This case came on regularly this day for pro-

nouncing of judgment upon said defendants, who were present in court with attorney, F. J. Hennessey, Esq. B. F. Geis, Esq., Asst. U. S. Atty., was present on behalf of the United States. Said defendants were called for judgment, and Mr. Hennessey thereupon presented and filed motions for new trial and in arrest of judgments, which motions the Court ordered denied, to which order Mr. Hennessey entered an exception. After hearing Mr. Hennessey, and no cause appearing why judgment should not be pronounced herein, the Court ordered that defendant, James F. Sullivan, for the offense of which he stands convicted herein, be imprisoned for the period of three (3) months, and that defendant, Ben J. Kathriner, for the offense of which he stands convicted herein, be imprisoned for the period of six (6) months, in the County Jail, City and County of San Francisco, State of California. Further ordered that said defendants stand committed to the custody of the U. S. Marshal to execute said judgments and that commitments issue accordingly. Mr. Hennessey thereupon presented petition for writ of error, assignment of errors, whereupon the Court ordered that said writ be allowed and citation issue, and [16] that bond for costs on appeal be and the same is hereby fixed in the sum of \$250.00, and that bonds for the release of said defendants pending determination of appeal be fixed in the sum of \$2,500.00. [17]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8432.

Convicted Viol. National Prohibition Act.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER.

**Judgment on Verdict of Guilty as to the First Count
of the Information.**

Ben F. Geis, Esq., Assistant United States Attorney, and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the information filed on the 21st day of May, 1920, charging them with the crime of violating the National Prohibition Act; of their arraignment and plea of Not Guilty; of their trial and the verdict of the jury on the 23d day of September, 1920, to wit:

“We, the Jury, find James F. Sullivan and Ben J. Kathriner, the defendants at the bar, Guilty on the first count. Not Guilty on second count.

W. R. PENTZ,
Foreman.”

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied

a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said James F. Sullivan and Ben J. Kathriner having been duly convicted in this court of the crime of violating the National Prohibition Act; [18]

IT IS THEREFORE ORDERED AND ADJUDGED that the said James F. Sullivan be imprisoned for the period of three (3) months and that Ben J. Kathriner be imprisoned for the period of six (6) months. Further ordered that said terms of imprisonment be executed upon the said James F. Sullivan and Ben J. Kathriner by imprisonment in the County Jail, county of San Francisco, State of California.

Judgment entered this 25th day of September, A. D. 1920.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Entered in Vol. 10, Judg. and Decrees, at page 125. [19]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 8432.

UNITED STATES

vs.

JAMES F. SULLIVAN and BEN J. KATRINER.
(Certificate of Clerk U. S. District Court to Judgment-roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 25th day of September, 1920.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [20]

In the District Court of the United States in and
for the Southern Division of the Northern District of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER,

Bill of Exceptions.

BE IT REMEMBERED that heretofore, the United States Attorney, in and for the Northern District of California, did file in the above-entitled court an information against the above-named defendants and thereafter the said defendants appeared in court and upon being called to plead to said information filed a demurrer to said information as shown by the record herein, and the said demurrer being overruled by the said court, each defendant pleaded not guilty as shown by the record herein, and the cause being at issue, the same coming on before Maurice T. Dooling, District Judge, and a jury duly empaneled, the United States being represented by Ben F. Guiss and Albert M. Hardie and the defendants being represented by Frank J. Hennessy, the following proceedings were had:

Testimony of V. H. De Spain, for the Government.

V. H. DE SPAIN, called for the United States, being sworn, testified as follows:

Mr. GEIS.—Q. Mr. De Spain, you are a prohibition agent? A. Yes.

Q. And have been for how long?

A. Since April.

Q. Do you know the defendants in this case, Mr. DeSpain? A. I do.

Q. Where were you on the 23d of April of this year? A. At 1123 Folsom Street. [21]

Q. Whose place of business is that, if you know?

A. Ben Katriner's.

(Testimony of V. H. De Spain.)

Q. One of the defendants here? A. Yes.

Q. Will you state to the Court and jury just what occurred at this place on that day?

A. Mr. Katriner conducts a soft-drink establishment, formerly a saloon, and Officer Hanley and myself entered his place about half-past twelve of the 23d, walked up to the bar and told him who we were; I, myself, jumped over the bar and the bartender was behind the bar at the time, Mr. Katriner was not in the saloon at the time.

Q. Who was his bartender, the other defendant?

A. Mr. Sullivan; and we found behind the bar a pitcher containing about a quart of jackass brandy, which we poured in some bottles and sealed up thereat the time.

Q. Was the liquor in a pitcher?

A. In a pitcher, a white pitcher.

Q. Did you at that time and place put the contents in bottles? A. We did, yes.

Q. Just look at the bottles that I now hand you; I ask you if those are the bottles and that is the liquor that was contained in the pitcher at the time you have just spoken about? A. Yes.

Q. Those are the same three bottles?

A. The same three bottles.

Q. And the same contents as was out there at that time? A. Yes.

Mr. GEIS.—We offer them for identification as U. S. Exhibit 1.

(The bottles were marked "U. S. Exhibit 1 for Identification.")

(Testimony of V. H. De Spain.)

Q. Did you have any conversation of any kind or character with the defendants, or either of them, at that time?

A. We just told them to appear at that time, and then we returned there again at 3:30 of the same day.

[22]

Mr. HENNESSY.—I object to the conversation you just asked him if he had any conversation.

EXCEPTION No. 1.

Mr. GEIS.—Q. Did you have any conversation at 3:30? A. I did.

Q. With reference to the liquor? A. Yes.

Q. With whom did you have it?

A. In the place at 1123 Folsom the conversation was with Mr. Katriner, himself.

Q. Respecting the liquor that he had there?

A. Yes.

Q. What was it?

Mr. HENNESSY.—I object to the conversation upon the ground it is immaterial, irrelevant and incompetent.

The COURT.—The objection is overruled.

Mr. HENNESSY.—Note an exception,

A. Mr. Katriner says, "You can't arrest us," and Mr. Hanley says, "Why," and he said, "I am paying for protection to do this kind of business."

Mr. GEIS.—Q. Anything further?

A. He was paying two men out of the Sheriff's office.

Q. For protection for doing business?

A. To sell liquor.

(Testimony of V. H. De Spain.)

Q. Was there anything else said or done at that time respecting the liquor there?

A. They had another pitcher with liquor in it, but they beat me to it and dumped it; they had a sink full of creosote and they dumped it into it.

Mr. HENNESSY.—I object to that statement of the witness as a conclusion, that he beat him to it.

Mr. GEIS.—All right.

Q. Just state the order in which it occurred. You say they beat you to it.

A. We came into the place again, and I started to go behind the bar— [23]

Mr. HENNESSY.—Q. When was this?

A. At 3:30 of the same day, and Mr. Sullivan took the pitcher and dumped it into this creosote and then shook it out.

Mr. GEIS.—Q. At what time, if any, did Mr. Sullivan appear on the scene?

A. At the place, he was there both times; he was there all the time; he was there the first time and second time, also.

Q. They both were there, then?

The COURT.—No, he has not said so. He said that Mr. Sullivan, the bartender, was there all the time.

Mr. BEIS.—Q. Mr. Sullivan was there all the time? A. Yes.

Q. What period of the time was Katriner there?

A. He came in the first time, and he was in there the second time when we came in. The first time he was not, but he came in a few minutes afterward.

(Testimony of V. H. De Spain.)

Q. Did you have any other conversation than that which you have just related?

A. When we were taking Mr. Sullivan to lock him up, walking up Seventh Street, I said to him, "What are you getting a shot for it?" and he said, "twenty five cents."

Q. What is that?

A. I asked him what he was getting a drink for it, and he said, "twenty-five cents."

Q. Who said that? A. Mr. Sullivan.

Q. Were there any statements made by Mr. Katriner, other than you have stated or related with respect to this case?

A. Not outside of saying what I have said, no.

Cross-examination.

Mr. HENNESSY.—Q. What time did you go there first on the 23d? A. Between 12 and 12:30.

Q. Who was with you? A. Officer Hanley. [24]

Q. Was there anybody besides Mr. Sullivan in the place when you went there?

A. There were two or four men in front of the bar, and there was another man at the end of the bar, a stout man.

Q. As I understand you, Mr. Katriner was not present? A. Not when we went in.

Q. Did you see any sales of liquor made at that time?

A. There were two glasses on the bar, with strong evidence that it was the same liquor that we found is the pitcher.

Q. You say strong evidence. What do you mean?

(Testimony of V. H. De Spain.)

Did you get any of the contents of the glasses?

A. There was a little bit in the bottom of each glass, enough so that we could smell it, and the smell seemed the same as the liquor that we found in the pitcher.

Q. You don't know what the alcoholic contents of the glasses on the bar were, do you?

A. Not on the bar, but we know the alcoholic contents of the liquor that we found in the pitcher.

Q. Then you went up to the bar and you jumped over the bar? A. I did.

Q. Did you have a search-warrant?

A. No search-warrant.

Q. Did you make a search of the premises on this occasion?

A. Not much of a search, because we found the liquor behind the bar.

Q. All the liquor that you found was this small quantity of liquor in this pitcher? A. Yes.

Q. And you never saw any of that liquor in the pitcher dispensed or sold over the bar, did you?

A. No.

Q. When you returned there at 3:30, who was on the premises?

A. Mr. Sullivan was behind the bar, and Mr. Katriner was standing in front of the bar, and there were a number of other patrons [25] in the place, I don't know how many.

Q. What did Mr. Sullivan do, or what did Mr. Katriner do?

A. Mr. Katriner did not do anything.

(Testimony of V. H. De Spain.)

Q. He was outside the bar?

A. Outside the bar; he stood there.

Q. What occurred?

A. I started to go around behind the bar again and Mr. Sullivan takes this pitcher and dumps it into this sink of creosote, or sheep dip, and then shook it out.

Q. You did not get any of the contents of that pitcher? A. No.

Q. Did you see any sales of liquor made upon that occasion? A. No.

Q. Did you have a search-warrant upon the occasion of the second visit? A. No.

Mr. HENNESSY.—I guess that is all.

Redirect Examination.

Mr. GEIS.—Q. After you had placed the liquor that was in the pitcher in the bottles, what did you do with the bottles, or any of them?

A. We took one of them down and had it tested by Mr. Love.

Q. The United States Chemist?

A. Yes, and then we took the three of them and brought them up here and had them locked up upstairs.

Q. Is this building? A. Yes.

Mr. GEIS.—That is all.

Mr. HENNESSY.—That is all.

Testimony of J. F. Hanley, for the Government.

J. F. HANLEY, called for the United States, being sworn, testified as follows:

Mr. GEIS.—Q. Mr. Hanley, you are a prohibition agent of the Government? A. Yes. [26]

Q. And were such on the 23d of April, last?

A. Yes.

Q. Were you present with Officer De Spain, who just left the witness-stand, on the occasion to which he referred in his testimony? A. Yes.

Q. Where is this place of business located, if you remember?

A. 1123 Folsom Street, on the south side of the street, on the corner of Langdon Street.

Q. In this city and county, and in the State of California? A. Yes.

Q. Will you relate just briefly to the Court and jury what occurred on that occasion?

A. De Spain and I went to this place at 1123 Folsom Street, formerly a saloon, now a soft-drink establishment, and Officer De Spain went behind the bar and procured the evidence which is in those bottles there; it was in a crockery pitcher, and he brought it up to the bar and poured it into these bottles and sealed it up in my presence, and that of Mr. Sullivan.

Q. Did you again return to the place?

A. Yes, at 3:30 we returned again.

Q. Just going back a minute; was there anything said by either of the defendants to you or to Mr. De Spain respecting this liquor? A. Yes.

(Testimony of J. F. Hanley.)

Q. I mean the first time.

A. The first time; yes.

Q. What was it?

A. Mr. Katriner entered about two minutes after we were in the place, and when he came in we gave him orders to appear at the Commissioner's office the following morning at ten o'clock, and he said, "You cannot arrest me, because I am under protection from two men from the Sheriff's office for selling liquor here." He specified \$300. He mentioned their names, but I forget who they were.
[27]

Q. Did he say under protection for the sale of liquor? A. Yes.

Q. Then you returned again, did you not, in the afternoon? A. Yes, at 3:30.

Q. Who was there at that time?

A. Mr. Katriner was in front of the bar and Mr. Sullivan was behind the bar, acting in the capacity of a bartender; there were four or five patrons in the place, and at that time I saw Mr. Sullivan go after the contents of the pitcher and dump them into the drainboard, where there was creosote, and we could not get anything at all.

Q. Was this the same pitcher? A. Yes.

Q. I mean, was it the same container?

A. Why, the same kind of pitcher that time as the first one.

Q. The same kind of container?

A. Yes. We took Sullivan down, and he said on the way down, at the corner of Seventh and Fol-

(Testimony of J. F. Hanley.)

som, between Folsom and Howard—he admitted he was selling it for 25 cents a drink.

Q. The liquor that was in the pitcher?

A. Yes.

Q. Did Mr. Katriner make any statement to you with respect to the price of this liquor?

A. No, not to me.

Q. Did you observe any evidence of sale of liquor there on either the first or second occasion?

A. There were two empty glasses on the bar, and two men standing behind them when we were there.

Q. Was there anything in the glasses?

A. A little bit in each glass of the same stuff.

Q. In the bottom of each glass? A. Yes.

Cross-examination.

Mr. HENNESSY.—Q. You don't know what was in the glasses, do you, Mr. Hanley?

A. No, except by smell, the same as in the pitcher. [28]

Q. You did not taste it? A. No.

Q. Or did not take any part of it for the purpose of having it analyzed to see whether it contained more than one-half of one per cent of alcohol?

A. No.

Q. You never saw any sale of liquor made on those premises? A. No.

Q. When you first went in there, was Mr. Katriner present? A. No, he was not.

Q. Did you have a search-warrant? A. No.

Q. What did you do when you went in there?

(Testimony of J. F. Hanley.)

A. Mr. De Spain was the first to enter, and he went behind the bar.

Q. How did he get behind the bar?

A. He jumped over the bar the first time. The second time he went around the bar.

Q. You did not have a search-warrant on the second occasion, did you, either, Mr. Hanley?

A. No, it being a saloon, a public place, we did not need one.

Q. Upon the occasion of the second visit, you did not get any part of the liquor contained in the pitcher that you say Mr. Sullivan poured out?

A. We did, but it was mixed up with creosote; we did not take it to test at all.

Q. You did not have any analysis made of it?

A. No.

Q. You could not say whether it contained over one-half of one per cent of alcohol? A. No.

Mr. HENNESSY.—I guess that is all.

Redirect Examination.

Mr. GEIS.—Q. Was this place what you call a soft-drink establishment? A. Yes.

Q. Where they dispose of soft drinks?

A. It was formerly a saloon.

Q. But it was then conducted apparently as a soft-drink parlor? [29]

A. Yes; it is still open down there.

Mr. GEIS.—That is all.

Testimony of R. F. Love, for the Government.

R. F. LOVE, called for the United States, being sworn, testified as follows:

Mr. GEIS.—Q. Mr. Love, you are a Government chemist? A. Yes.

Q. You know Mr. De Spain, do you? A. Yes.

Q. Do you remember an occasion of his bringing to you a bottle containing some liquid?

A. I do.

Q. I hand you one of the bottles which I think has your initials on. Do you recognize that as a bottle that was given to you by Mr. De Spain, or did he give you more than one?

A. This is the one.

Q. That is the one? A. Yes.

Q. Did you make an analytical test of its contents? A. I did.

Q. What did you find?

A. It contains $34\frac{1}{2}$ per cent of alcohol by volume.

Q. What is that proof?

A. I could say about 69.

Q. Fit for use of beverage purposes?

A. Yes.

Q. And this you returned to Mr. De Spain afterwards, as I understand you? A. Yes.

Mr. GEIS.—That is all.

Cross-examination.

Mr. HENNESSY.—Q. How long have you been Government chemist, Mr. Love? A. Two years.

(Testimony of R. F. Love.)

Q. When was this submitted to you for analysis, do you remember?

A. I don't remember the date. It is marked on the bottle there, the date I received it, May 25.
[30]

Q. By whom was it delivered?

A. Mr. De Spain.

Q. What did you do with it after making the analysis? A. I returned it to Mr. De Spain.

Q. Personally? A. Yes.

Mr. HENNESSY.—I think that is all.

Mr. GEIS.—That is all.

Testimony of Jesse Copestake, for the Government.

JESSE COPESTAKE, called for the United States, being sworn, testified as follows:

Mr. GEIS.—Q. Mr. Copestake, you know Mr. De Spain? A. Yes.

Q. Do you remember him delivering to you a bottle of some liquor or, rather, three bottles, of which this is one? A. Yes.

Q. You have had it in your possession ever since? A. I have.

Q. Will you now say to the Court and jury that the contents of these bottles are identically the same as they were when you received it—the same contents as it has now? A. Yes.

Cross-examination.

Mr. HENNESSY.—Q. When was it delivered to you, Mr. Copestake?

A. Just after the case was brought.

(Testimony of Jesse Copestake.)

Q. Do you remember the date?

A. I recall the incident, but I don't remember the date.

Q. Where have you kept it since that time?

A. We have a room upstairs, and I am the only one that has a key to it; I kept it in there.

Q. You kept it in this room, did you?

A. Yes.

Q. With a great many other exhibits?

A. Yes.

Mr. HENNESSY.—I think that is all.

Mr. GEIS.—Now, if your Honor please, we offer the three [31] bottles in evidence.

Mr. HENNESSY.—We object to them on the ground that there was an illegal search and seizure under the Fourth Amendment to the Constitution, that is, they were taken without a search-warrant.

The COURT.—The objection is overruled.

Mr. HENNESSY.—We note an exception.

(The bottles were marked "U. S. Exhibit 1.")

Testimony of Albert Hardie, for the Government.

ALBERT HARDIE, called for the United States, being sworn, testified as follows:

Mr. GEIS.—Q. Mr. Hardie, do you remember an occasion when you met Mr. Hennessy and the defendant, Katriner, in the building, here?

A. I do.

Q. What did Mr. Katriner, in the presence of his attorney, say to you?

A. Mr. Katriner wished to make a statement to

(Testimony of Albert Hardie.)

me, and I turned to Mr. Hennessy and I said I was going to take a statement from Mr. Katriner, and invited Mr. Hennessy to my office. Mr. Hennessy left and said, "That is all right, Bert; go ahead."

Mr. HENNESSY.—When was that?

A. That was at the conclusion of the preliminary hearing, or shortly thereafter.

Mr. GEIS.—Q. Did Mr. Katriner come to you and make a statement then? A. He did.

Q. What did he say?

A. He stated that he was running the premises at 1123 Folsom Street.

Mr. HENNESSY.—I would like to interrogate the witness as to whether this was a free and voluntary statement.

Mr. GEIS.—Sure.

Mr. HENNESSY.—Q. Had you spoken to the defendants about [32] making a statement prior to this conversation outside of the Commissioner's office, Mr. Hardie?

A. No, I had not. The word came to me that he wished to make a statement.

Q. Who told you that he wished to make a statement? A. Mrs. De Wolfe.

Q. Mrs. De Wolfe?

A. Yes; Mrs. Hull, as she is generally known.

Q. The newspaper reporter?

A. Yes, the newspaper reporter for the "Examiner."

Q. Where were you when she made that statement to you?

(Testimony of Albert Hardie.)

A. I was in the hallway upstairs, on the fourth floor.

Q. What did you do?

A. I went down to the third floor.

Q. What occurred?

A. I saw Mr. Katriner, and you were there, and if I remember correctly I asked Katriner if he wished to make a statement, and he said yes, or he told me he wished to make a statement; it was free and voluntary on his part.

Q. Was I present?

A. Yes. I turned to you and stated to you that Mr. Katriner was going to make a statement to me, and invited you to my office, and you said, "No, that is all right."

Q. Where were you when you invited me to your office?

A. I was right off of the elevator on the third floor; this was just as you came of the Commissioner's office; I had been down to the Commissioner's office, and I came upstairs, and I forget whether I had gone to my office and come out into the hall, or was on my way up to my office, but at any rate I was in the hallway.

Q. Where was Katriner at the time?

A. When Katriner spoke to me?

Q. Where was he at the time you say you made the statement to me, inviting me upstairs?

A. Katriner was in the hallway on the [33] third floor; Katriner and Sullivan were together,

(Testimony of Albert Hardie.)

and you were also there, and I turned to you and spoke to you.

Q. You say you invited me up? A. Yes.

Q. What did you do then?

A. I went to the office and had a typewriter brought in.

Q. Who were present?

A. Mr. Katriner, Mr. Sullivan and Mr. Hanley and myself.

Q. Was I present at any part of those conversations? A. You were not.

Q. Did you make any offers of leniency or anything of that sort to Mr. Katriner?

A. None whatever.

Q. Did you make any inducement of any kind?

A. None whatever; I so stated to him.

Q. What did you say to him before he made the statement?

A. I advised him as to his rights, and said that in making the statement it had to be voluntary on his part, and with no offer of indictment from me whatever.

Q. Who all were present, did I understand you to say?

A. I was present, Mr. Katriner was present, Mr. Hanley was present, and Mr. Sullivan was present. Mr. Hanley did not stay until the conclusion of the statement, he left.

Q. I was not present, and took no part in it?

A. You were not present at any time.

(Testimony of Albert Hardie.)

EXCEPTION No. 2.

Mr. GEIS.—Q. Just state what he said.

A. Mr. Katriner said, “My name is Benedict Katriner. I reside at 1123 Folsom. This is a lodging-house and saloon on the corner downstairs. I lease the building and conduct the saloon.

“On Tuesday, April 20, 1920, three men by the names of Willie Wolf, Meimier and Jack Birch came to see me at the saloon [34] and invited me for a dinner at 917 Pacific Street. We all went over there in my machine from the Goldman Garage. While going over, Meimier stated that the prohibition appropriation had become exhausted, and that he and four other men, two besides Wolf and Jack Birch, had been detailed to take charge of prohibition enforcement in San Francisco. He further stated that he and his men would give me a good deal, and allow me to sell all the liquor I was able to procure for two weeks. I gave him \$150, and he states that this was not sufficient, but that if I gave them another \$150 it would be sufficient. I thereupon returned to my premises with them and they stood at my bar until I returned with the other \$150. I then gave them this additional \$150. We then again went to 917 Pacific Street and had our dinner. We then returned to my place, and Wolf and Birch quarreled all the way over because I had not given them enough money. They left a star with me.”

Mr. HENNESSY.—I object to this on the ground it is immaterial, irrelevant and incompe-

(Testimony of Albert Hardie.)

tent, and has nothing to do with the charge upon which these men are now on trial.

Mr. GEIS.—I think this is preliminary.

Mr. HENNESSY.—It was about two or three months prior.

The COURT.—The objection is overruled.

Mr. HENNESSY.—Note an exception.

A. (Continuing.) “At my saloon these men had a round of drinks in my place, of jackass brandy, for which they paid 25 cents a drink. I have conducted this saloon since the 1st of August, 1919. Mr. Sullivan is the name of my bartender. The next day these three men returned to the saloon and my bartender sold them a round of drinks of jackass brandy, which they paid for. My bartender, Sullivan, waited on them at that time. These men states that they had everything fixed and that I was perfectly [35] safe in selling for two weeks, or until further notice. This was on Wednesday, April 1st. Mr. Willie Wolf is a deputy sheriff and Meimer and Birch also exhibited stars, but I could not swear that they were officers.

Dated at San Francisco, California, April 24, 1920.

[Signed] BENEDICT KATRINER.

The above statement is correct as to sales of liquor by me.

(Signed) JAMES FRANCIS SULLIVAN.”

The witnesses are C. H. De Wolfe and Albert M. Hardie.

EXCEPTION No. 3.

Mr. HENNESSY.—I move to strike out this statement upon the ground it is immaterial, irrelevant and incompetent, and has nothing to do with the issues before the court.

The COURT.—The motion will be denied.

Mr. HENNESSY.—Exception.

Mr. GEIS.—That is all. That is our case.

EXCEPTION No. 4.

Mr. HENNESSY.—For the purpose of the record, Judge, I want to move at this time—your Honor remembers I interposed a demurrer to the information upon the ground that the information charges possession, and that the Volstead Act, in so far as it attempts to prohibit possession, is contrary to the amendment.

The COURT.—I remember.

Mr. HENNESSY.—I desire to move for a directed verdict of not guilty upon the ground that possession of liquor is not contrary to any valid laws of the country, and not in violation of the Eighteenth Amendment, and that that portion of the Volstead Act which attempts to prohibit possession of intoxicating liquor is invalid and unconstitutional.

The COURT.—The motion will be denied. [36]

Mr. HENNESSY.—Exception. The defendants rest.

(Thereupon counsel proceeded to argue the case, at the conclusion of which the following proceedings were had.)

Charge to the Jury.

The COURT (Orally).—Gentlemen, the defendants are charged in the information here in two counts, the first one being that on the 23d day of April of this year they did unlawfully, wilfully and knowingly keep on the premises situated at 1123 Folsom Street certain intoxicating liquor, to wit, about one quart of brandy; and in the second count they are charged with having the said brandy in their possession unlawfully.

I need not say to this jury that whatever the sentiment is for or against the enforcement of this prohibition law, that is a matter with which you and I are not concerned. The law is on our statute books; the amendment was adopted, the matter had been carried clear to the Supreme Court of the United States, and it has been declared to be a valid amendment, a valid law, and there is nothing on earth for the jury to do but enforce it. I do not say that for the purpose of influencing you in this case, because it is the province of the jury to pass upon the guilt or innocence of each defendant as he comes before it, but I do say that in response to the suggestion of counsel that these are trifling matters. These are not trifling matters. There are over 200 cases in this court now awaiting trial. This thing occurred on the 23d of last April and we have just got around to it. If juries are going to encourage violations of law by acquitting defendants who are guilty, we will never get through. This is the only court in this district extending

from the County of Monterey to the Oregon [37] line, and from the Pacific Ocean to Nevada, which is empowered to enforce this law, and if juries do not assist in the enforcement of the law, we will get no further.

I have no desire, nor has anyone who is connected with the Government any desire, that one who is innocent shall be convicted or that his liberty be jeopardized for a moment. It is equally true that a defendant who is proven guilty should not be acquitted. If that should happen time and time again by juries, the administration of the law falls down. I say that not to influence you in this particular case or any subsequent one, but to impress upon your mind that in dealing with these matters you are dealing with a very important subject.

Bearing upon these charges, I call your attention to the first provision of the law defining what intoxicating liquor is:

“Intoxicating liquor shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of one percentum or more of alcohol by volume, which are fit for use for beverage purposes.” Section 21 provides that “any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same,

is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor, and upon conviction" shall be punished as therein provided. [38]

Now, Congress has the right to define, the legislature has the right to define what is a common nuisance. It may not agree with our definition of a common nuisance, but still it is the province of Congress to say what shall be a common nuisance. Whether a man's neighbors complain or not is absolutely immaterial in determining whether a man is guilty of maintaining a common nuisance.

The question for you to determine is, Did these men keep that liquor there? And if they kept it there, did they have a right to keep it there?

Let *is* inquire under what circumstances they would have the right to keep it there.

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the Commissioner within ten days after the date when the Eighteenth Amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquor in his possession."

The burden is upon the defendants, if they are found with liquor, to show that such possession is lawful. As they have offered no evidence in that

regard, it must be taken by the jury that they have no evidence of that character to offer.

The defendant here, as in every criminal case, are presumed to be innocent, and that presumption attaches at the beginning of the trial and continues throughout and until the jury by its verdict shall determine otherwise. The jury should [39] not so determine unless they are satisfied from the evidence in the case of the guilt of the defendants beyond a reasonable doubt.

A reasonable doubt is that state of the case which after an entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge. If you have such a reasonable doubt, of the guilt of the defendants, then it is your duty to give them the benefit of that doubt and acquit them; on the other hand, if you have no such reasonable doubt, it is equally your duty to render a verdict of guilty.

It is the law that a defendant in a criminal case is not bound to take the witness-stand and his failure or refusal or neglect to do so cannot in any manner prejudice him.

It is also the law that "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."

We have this situation as developed by the evidence—it is, of course, your sole province to pass

upon the facts, but the Court may call your attention to them—the defendant Katriner, from the evidence presented, was the owner or runner of these premises at the place named, which had formerly been a saloon, but which was at this time conducted as a soft-drink place. In that place, behind the bar, there was found a pitcher containing about a quart of liquor which the chemist has told us contained about $34\frac{1}{2}$ per cent of alcohol by volume, or about 69 proof. There is other evidence tending to show that the defendant Katriner declared that he had paid somebody for the [40] privilege of selling liquor, for protection. You will take all of these facts into consideration and determine whether these men had that liquor there, and if so, what they had it there for. If they had it there unlawfully, or for an unlawful purpose, for the purpose of sale, they were maintaining a common nuisance, as charged in the first count.

While, as I say, it not desired by the Court or any of its officers that men who are innocent, or about whose guilt there may be a reasonable doubt, should be convicted or that his liberty should be jeopardized, the Court and its officers are equally desirous that juries should take into consideration the seriousness of the situation, and in any instance where there is no reasonable doubt as to the guilt of the defendants they should not have any hesitation in bringing in such a verdict. You may retire.

(Thereupon the jury retired and subsequently returned into court, finding the defendants guilty on the first count and not guilty on the second.)

Thereupon the said Court continued said case to September 25, 1920, for judgment.

The said defendant hereby present the foregoing as their bill of exceptions herein and respectfully ask that the same be allowed, signed and sealed and made a part of the record in this case.

Dated this 22d day of December, 1920.

FRANK J. HENNESSY,
Attorney for Defendant. [41]

In the District Court of the United States in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER.

Notice of Presentation of Bill of Exceptions.

To Frank M. Silva, Esq., United States Attorney
and Ben F. Geis, Esq., and Albert M. Hardie,
Assistant United States Attorneys:

You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendants in the above-entitled cause, and the said defendants will apply to the said Court to allow said bill of exceptions and to sign and seal the same as the bill of exceptions herein.

FRANK J. HENNESSY,
Attorney for Defendants. [42]

In the District Court of the United States in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER.

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED and agreed that
the foregoing bill of exceptions is correct and that
the same may be signed, settled, allowed and sealed
by the Court.

Dated this 17th day of January, 1921.

FRANK M. SILVA,

United States Attorney.

FRANK J. HENNESSY,

Attorney for Defendants. [43]

In the District Court of the United States in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

JAMES F. SULLIVAN and BEN J. KATRINER.

Order Settling Bill of Exceptions.

This bill of exceptions having been duly presented

to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, is now signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated this 17th day of January, 1921.

M. T. DOOLING,
United States District Judge.

Due service and receipt of a copy of the within of presentation of bill of exceptions is hereby admitted this 17th day of January, 1921.

FRANK M. SILVA,
United States Attorney.

Due service and receipt of a copy of the within order of the Judge settling said bill of exceptions is hereby admitted this 17th day of January, 1921.

FRANK M. SILVA,
United States District Attorney.

[Endorsed]: Lodged Dec. 22, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

Filed Jan. 17, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [44]

In the District Court of the United States, in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

BENJAMIN KATHRINER and JAMES SUL-
LIVAN,

Defendants.

Petition for Writ of Error and Supersedeas.

Now come Benjamin Kathriner and James Sullivan, defendants herein, by Frank J. Hennessy, their attorney, and say that on the 25th day of September, 1920, this Court rendered judgment herein against the defendants, in which judgment and the proceedings had prior thereto in this cause certain errors were permitted to the prejudice of the defendants, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, the defendants pray that a writ of error may issue in their behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid, and that these defendants be awarded a supersedeas upon said judgment and all

necessary and proper process including bail.

BENJAMIN KATHRINER,
JAMES SULLIVAN,

Defendants.

By FRANK J. HENNESSY,
- Attorney for Defendants.

[Endorsed]: Receipt of copy of within petition
this 25th day of Sept., 1920, is hereby admitted.

FRANK M. SILVA,
United States District Attorney. [45]

Filed Sep. 25, 1920. W. B. Maling, Clerk. By C.
W. Calbreath, Deputy Clerk. [46]

In the District Court of the United States, in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

BENJAMIN KATHRINER and JAMES SUL-
LIVAN,

Defendants.

Assignment of Errors.

Benjamin Kathriner and James Sullivan, the plain-
tiffs in error in the above-entitled cause, and Frank
J. Hennessy, their attorney, in connection with their
petition for a writ of error, make the following as-
signment of errors, which they allege occurred upon
the trial of said cause:

1. The Court erred in overruling the objection made by plaintiffs in error to the question asked the witness De Spain, for the Government: "Did the defendants make any statement to you after their arrest and what statement did they make?" To which ruling the plaintiffs in error duly excepted.

2. The Court erred in overruling the plaintiffs in error objection to the question asked witness Hanley, for the Government: "What, if any, statement did the defendants make to you after their arrest? To which ruling the plaintiffs in error duly excepted.

3. The Court erred in overruling the objection of the plaintiffs in error to the admission of evidence to a certain quantity of liquor. Said objection being based upon the ground that said liquor was seized as the result of a search and seizure without any search-warrant, and without authority of law to which ruling the plaintiffs in error duly excepted.

4. The Court erred in denying the motion of the plaintiffs [47] in error for a directed verdict of not guilty upon the ground that the evidence offered did not establish the commission by the defendants of any public offense against the laws of the United States. To which ruling the plaintiffs in error duly excepted.

5. The Court erred in denying the motion of the plaintiffs in error for a directed verdict of not guilty upon the ground that the information herein does not state facts sufficient to constitute a public offense by either of said defendants. To which ruling the plaintiffs in error duly excepted.

6. The Court erred in denying the motion for a

new trial on behalf of defendants in this, that the said verdict finding the defendants guilty on the first count of said information is not supported by any evidence. To which ruling the plaintiffs in error duly excepted.

7. The Court erred in denying the motion of arrest of judgment on behalf of defendants, in this:

(a) That the said information herein does not state facts sufficient to constitute a public offense.

(b) That the said defendants were not, nor was either of them ever indicted by a Grand Jury prior to the trial of the offense charged in the information on file herein. To which ruling the defendants duly excepted.

BENJAMIN KATHRINER,
JAMES SULLIVAN,

Defendants.

By FRANK J. HENNESSY,
Attorney for Defendants. [48]

[Endorsed]: Receipt of a copy of within assignment of errors this 25th day of September, 1920, is admitted.

FRANK M. SILVA,
United States District Attorney.

Filed Sep. 25, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [49]

In the District Court of the United States, in and for
the Southern Division of the Northern District
of California.

No. 8432.

UNITED STATES OF AMERICA

vs.

BENJAMIN KATHRINER and JAMES SULLI-
VAN,

Defendants.

Order Allowing Writ of Error and Supersedeas.

The writ of error and the supersedeas herein
prayed for by Benjamin Kathriner and James Sulli-
van, the plaintiffs in error, pending the decision upon
said writ of error, are hereby allowed and the defend-
ants are admitted to bail upon the writ of error each
in the sum of \$2500.

The bond for costs of the writ of error is hereby
fixed at the sum of \$250 for each defendant.

Dated at San Francisco, California, this 25th day
of September, 1920.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Receipt of a copy of within order this
25th day of Sept., 1920, is admitted.

FRANK M. SILVA,
United States District Attorney.

Filed Sep. 25, 1920. W. B. Maling, Clerk. By C.
W. Calbreath, Deputy Clerk. [50]

Premium \$50.

8432

(Internal Revenue Documentary Stamp—50¢, Duly
Cancelled.)

**(Bond to Appear on Writ of Error—Benjamin J.
Kathriner.)**

UNITED STATES OF AMERICA.

Northern District of California,—ss.

BE IT REMEMBERED, That on this 25th day of September, in the year of our Lord one thousand nine hundred and twenty, before the undersigned, a United States Commissioner, duly appointed by the United States District Court for the Northern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the Courts of the United States, pursuant to the Acts of Congress, in that behalf, personally appeared Benjamin J. Kathriner 1123 Folsom St., as principal, and National Surety Company, as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of Two Thousand Five Hundred (\$2500) Dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The conditions of the above recognizance are such, that, whereas, an information has been presented by the United States Attorney for the Southern Division of the Northern District of California, and filed on the 21st day of May, A. D. 1920, in the Southern

Division of the United States District Court for the Northern District of California, charging the said Benjamin J. Kathriner with violation of Act October 28, 1919, National Prohibition Act committed on or about the 23d day of March, A. D. 1920, to wit, at the District and Division aforesaid, contrary to the form of the statute of the United States, in such case made and provided; [51] thereafter judgment of conviction was made and entered, sentence imposed and petition for writ of error allowed.

AND WHEREAS, the said Benjamin J. Kathriner has been required to give a recognizance, with sureties, in the sum of Two Thousand Five Hundred (\$2500) Dollars for his appearance pending appeal.

NOW, THEREFORE, if the said Benjamin J. Kathriner shall personally appear at the U. S. Circuit Court of Appeals, Ninth Circuit, and Southern Division of the United States District Court for the Northern District of California, to be holden at the courtroom of said court, in the city and county of San Francisco, on the ——— when required ——— at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and shall appear for judgment and render himself in execution thereof, then this recognizance shall be

void; otherwise to remain in full effect and virtue.

BENJAMIN KATHRINER. (Seal)

NATIONAL SURETY COMPANY. (Seal)

[Seal]

By C. T. HUGHES,
Its Attorney in Fact.

Acknowledged before me the day and year first
above written.

FRANCIS KRULL. (Seal)

United States Commissioner for the Northern Dis-
trict of California, at San Francisco.

[Endorsed]: Filed Sep. 27, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [52]

Premium \$50.

8432

(50¢ Internal Revenue Documentary Stamp—Duly
Cancelled.)

**(Bond to Appear on Writ of Error—James F.
Sullivan.)**

UNITED STATES OF AMERICA.

Northern District of California,—ss.

BE IT REMEMBERED, That on this 25th day
of September, in the year of our Lord one thousand
nine hundred and twenty, before the undersigned,
a United States Commissioner, duly appointed by
the United States District Court for the Northern
District of California, to take acknowledgments of
bail and affidavits, and also to take depositions of
witnesses in civil causes depending in the courts of
the United States, pursuant to the Acts of Congress,

in that behalf, personally appeared James F. Sullivan, 349 Golden Gate Ave., S. F., as principal, and National Surety Company, as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of Two Thousand Five Hundred (\$2,500) Dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The conditions of the above recognizance are such, that, whereas, an information has been presented by the United States Attorney for the Southern Division of the Northern District of California, and filed on the 21st day of May, A. D. 1920, in the Southern Division of the United States District Court for the Northern District of California, charging the said James F. Sullivan, with violation of Act October 28, 1919 (National Prohibition Act), committed on or about the 23d day of March, A. D. 1920, to wit, at the District and Division aforesaid, contrary to the form of the statute of the United States, in such case made and provided, [53] thereafter judgment of conviction was made and entered, sentence imposed and petition for writ of error allowed;

AND WHEREAS, the said James F. Sullivan has been required to give a recognizance, with sureties, in the sum of Two Thousand Five Hundred (\$2500) Dollars for his appearance pending appeal.

NOW, THEREFORE, if the said James F. Sullivan shall personally appear at the U. S. Circuit Court of Appeals, Ninth Circuit, and Southern Divi-

sion of the United States District Court for the Northern District of California, to be holden at the courtroom of said Court, in the City and County of San Francisco, on the — when required — at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and shall appear for judgment and render himself in execution thereof, then this recognizance shall be void; otherwise to remain in full effect and virtue.

JAMES F. SULLIVAN. (Seal)

NATIONAL SURETY COMPANY. (Seal)

By C. T. HUGHES, (Seal)

Its Attorney in Fact.

Acknowledged before me the day and year first above written.

(Seal)

FRANCIS KRULL,

United States Commissioner for the Northern District of California, at San Francisco.

[Endorsed]: Filed Sep. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

8432

(Bond for Costs on Writ of Error—Benjamin J. Kathriner.)

KNOW ALL MEN BY THESE PRESENTS, that we, Benjamin J. Kathriner, as principal, and

NATIONAL SURETY COMPANY, as sureties, are held and firmly bound unto UNITED STATES OF AMERICA in the full and just sum of Two Hundred Fifty (\$250) Dollars, to be paid to the said United States of America certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of September in the year of our Lord one thousand nine hundred and twenty.

WHEREAS, lately at a District Court of the United States for the Southern Division, Northern District of California, in a suit depending in said court, between United States of America, vs. Benjamin J. Kathriner, #8432, a judgment was rendered against the said Benjamin J. Kathriner, and the said Benjamin J. Kathriner having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,—

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Benjamin J. Kathriner shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make this plea good, then the above obliga-

tion to be void; else to remain in full force and virtue.

BENJAMIN J. KATHRINER. (Seal)

NATIONAL SURETY COMPANY. (Seal)

(Seal) By C. T. HUGHES,
Its Attorney in Fact.

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
United States Commissioner.

[Endorsed]: Filed Sep. 27, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [55]

8432

**(Bond for Costs on Writ of Error—James F.
Sullivan.)**

KNOW ALL MEN BY THESE PRESENTS, that we, JAMES F. SULLIVAN, as principal, and NATIONAL SURETY COMPANY, as sureties, are held and firmly bound unto UNITED STATES OF AMERICA in the full and just sum of Two Hundred Fifty (\$250) Dollars, to be paid to the said United States of America, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of September in the year of our Lord one thousand nine hundred and twenty.

WHEREAS, lately at a District Court of the United States for the Southern Division, Northern District of California in a suit depending in said court, between United States of America vs. James F. Sullivan, #8432, a judgment was rendered against the said James F. Sullivan, and the said James F. Sullivan having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,—

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said James F. Sullivan shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES F. SULLIVAN, (Seal)

NATIONAL SURETY COMPANY. (Seal)

(Seal)

By C. T. HUGHES,

Its Attorney in Fact.

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL,

United States Commissioner.

[Endorsed]: Filed Sep. 27, 1920. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [56]

Certificate of Clerk U. S. District Court to Transcript on Writ of Error.

I, WALTER B. MALING, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 56 pages, numbered from 1 to 56, inclusive, contain a full, true, and correct transcript of certain records and proceedings in the case of United States of America vs. James F. Sullivan and Ben J. Katriner, No. 8432, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error, and the instructions of the attorney for defendants and plaintiffs in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of Nineteen Dollars and Sixty Cents (\$19.60), and that the same has been paid to me by the attorney for plaintiffs in error herein.

Annexed hereto are the original writ of error, with return of this Court attached thereto, and the original citation on writ of error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 27th day of January, A. D. 1921.

[Seal]

WALTER B. MALING, Clerk.

By C. M. Taylor,

Deputy Clerk. [57]

In the District Court of the United States, in and for
the Northern District of California.

No. 8432.

BENJAMIN KATHRINER and JAMES SULLI-
VAN,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error (Original).

To the Honorable Judges of the District Court of the
United States for the Northern District of Cal-
ifornia, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
said District Court before you between Benjamin
Kathriner and James Sullivan, plaintiffs in error,
and the United States of America, defendant in
error, a manifest error has happened, to the
great damage of Benjamin Kathriner and James
Sullivan, plaintiffs in error, as by their complaint
appears, and it being that, if the error, if any there
hath been, should be duly corrected and full and
speedy justice done to the parties aforesaid, and in
this behalf you are hereby commanded, if judgment
be given, that then under your seal distinctly and
openly you send the record and proceedings afore-
said with all things concerning the same to the
United States Circuit Court of Appeals for the Ninth

Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, within thirty days from the date hereof in the said Circuit Court of Appeals for the Ninth Circuit to be then and there held, and the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right and according to law and custom of the United States should be done. [58]

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of September, 1920, and in the — year of the Independence of the United States.

Allowed:

M. T. DOOLING,
United States District Judge, [59]

[Endorsed]: No. 8432. District Court of the United States in and for the Southern Division of the Northern District of California. Benjamin Kathriner and James Sullivan, Plaintiffs in Error, vs. United States of America. Defendants in Error. Writ of Error. Filed Sep. 25, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Receipt of a copy of within writ of error this 25th day of Sept. 1920, is admitted.

FRANK M. SILVA,
United States District Attorney. [60]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 25th day of January, A. D. 1921, duly lodged in the case in this court for within named defendant in error.

By the Court:

[Seal]

WALTER B. MALING,
Clerk U. S. District Court, Northern District of
California.

By C. W. Taylor.

Deputy Clerk. [61]

In the District Court of the United States, in and
for the Northern District of California.

No. 8432.

BENJAMIN KATHRINER and JAMES SUL-
LIVAN,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error (Original).

United States of America,—ss.

The President of the United States to the United
States of America, GREETING:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be holden at the city
of San Francisco, State of California, within
thirty days from the date hereof, pursuant to a
writ of error duly issued and now on file in the
clerk's office, in the United States District Court,
in and for the Southern Division of the Northern
District of California, wherein Benjamin Kath-
riner and James Sullivan are the plaintiffs in er-
ror and you are the defendant in error, to show
cause, if any there be, why the judgment rendered
against said plaintiffs in error, as in said writ of
error mentioned, should not be corrected, and why
speedy justice should not be done to the parties in
that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, District Judge of the United States District Court, in and for the Southern Division of the Northern District of California, this 25th day of September, 1920.

M. T. DOOLING,
United States District Judge. [62]

[Endorsed]: No. 8432. District Court of the United States, in and for the Southern Division of the Northern District of California. Benjamin Kathriner and James Sullivan, Plaintiffs in Error, vs. United States of America, Defendants in Error. Citation to Writ of Error. Filed Sep. 25, 1920. W. B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.

Receipt of a copy of within citation this 25th day of Sept., 1920, is admitted.

FRANK M. SILVA,
United States District Attorney. [63]

[Endorsed]: No. 3637. United States Circuit Court of Appeals for the Ninth Circuit. Benjamin Kathriner and James Sullivan, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United

States District Court of the Northern District of California, First Division.

Filed January 27, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.

BENJAMIN KATHRINER and JAMES SULLIVAN,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA.

**Stipulation and Order Extending Time Thirty Days
to File Record and Docket Cause (Dated October
25, 1920).**

It is hereby stipulated that defendants have thirty days from the date hereof within which to docket the record in the above-entitled action and file the same in the clerk's office of the above-entitled court.

Dated this 25th day of October, 1920.

FRANK M. SILVA,

United States District Attorney.

FRANK J. HENNESSY,

Attorney for Plaintiffs in Error.

So ordered.

Dated this 25th day of October, 1920.

M. T. DOOLING,
District Judge.

[Endorsed]: No. 3637. United States Circuit Court of Appeals, Ninth Circuit. Benjamin Kathriner and James Sullivan, Plaintiffs in Error, vs. United States of America. Stipulation Extending Time to Docket Record. Filed Oct. 25, 1920. F. D. Monckton, Clerk. Refiled Jan. 27, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.

BENJAMIN KATHRINER and JAMES SULLIVAN,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Stipulation and Order Extending Time Thirty Days
to File Record and Docket Cause (Dated
November 23, 1920).**

It is stipulated that plaintiffs in error have thirty days from the date hereof within which to docket the record in the above-entitled cause and file the same in the clerk's office of the above-entitled court.

Dated this 23d day of November, 1920.

FRANK M. SILVA,
United States District Attorney.

FRANK J. HENNESSY,
Attorney for Plaintiffs in Error.

So ordered.

Dated November 23, 1920.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. 3637. In the United States Circuit Court of Appeals, Ninth Circuit. Benjamin Kathriner and James Sullivan, Plaintiffs in Error, vs. United States of America, Defendant in Error. Stipulation and Order Extending Time to Docket Record. Filed Nov. 24, 1920. F. D. Monckton, Clerk. Re-filed Jan. 27, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.

BENJAMIN KATHRINER and JAMES SULLIVAN,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA.

Stipulation and Order Enlarging Time to and Including January 21, 1921, to File Record and Docket Cause.

It is hereby stipulated that plaintiffs in error have thirty days from the date hereof within

70 *Benjamin Kathriner and James Sullivan*

which to docket the record in the above-entitled action and file the same in the clerk's office of the above-entitled court.

Dated this 22d day of December, 1920.

FRANK M. SILVA,

United States District Attorney.

FRANK J. HENNESSY,

Attorney for Plaintiffs in Error.

So ordered.

Dated this 22d day of December, 1920.

M. T. DOOLING,

District Judge.

[Endorsed]: No. 3637. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. Benjamin Kathriner and James Sullivan, Plaintiffs in Error, vs. United States of America. Dated December 22d, 1920. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including January 21, 1921, to File Record and Docket Cause. Filed Dec. 22, 1920. F. D. Monckton, Clerk. Re-filed Jan. 27, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.

BENJAMIN KATHRINER and JAMES SULLIVAN,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA.

Stipulation and Order Enlarging Time to and Including February 19, 1921, to File Record and Docket Cause.

It is hereby stipulated that plaintiffs in error have thirty days from the date hereof within which to docket the record in the above-entitled action and file the same in the clerk's office of the above-entitled court.

Dated this 20th day of January, 1921.

FRANK M. SILVA,

United States District Attorney.

FRANK J. HENNESSY,

Attorney for Plaintiffs in Error.

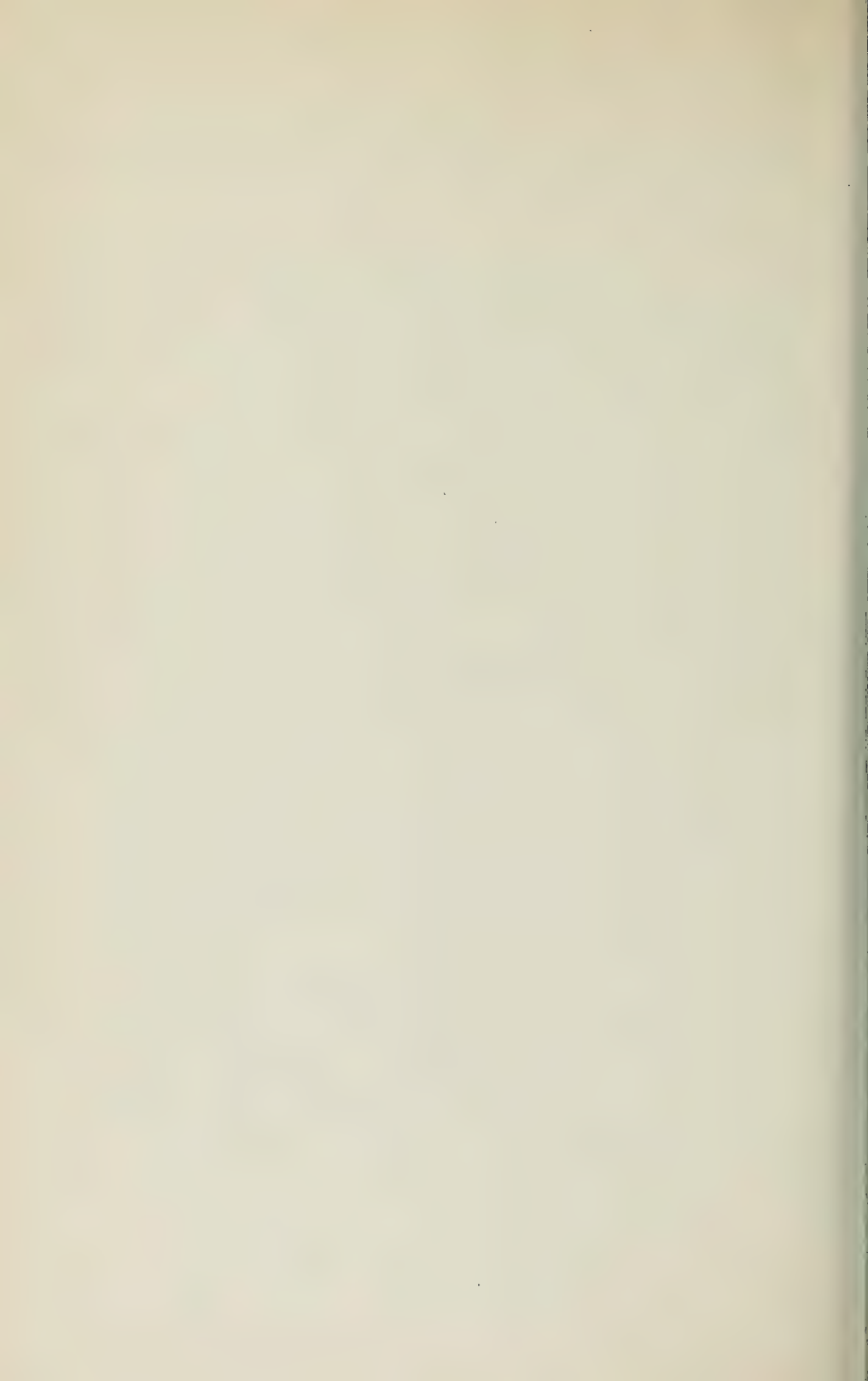
So ordered.

Dated this 20th day of January, 1921.

M. T. DOOLING,

District Judge.

[Endorsed]: No. 3637. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. Benjamin Kathriner and James Sullivan, Plaintiffs in Error, vs. United States of America. Dated, January —, 1921. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including February 19, 1921, to File Record and Docket Cause. Filed Jan. 20, 1921. F. D. Monckton, Clerk. Re-filed Jan. 27, 1921. F. D. Monckton, Clerk.



No. 3637.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

BENJAMIN KATHRINER and JAMES
SULLIVAN,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

FRANK J. HENNESSY,
Attorney for Plaintiffs in Error,
Grant Building,
San Francisco.

FILED
SEP - 6 1971
F. D. MONKTON,
CLERK

No. 3637.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BENJAMIN KATHRINER and JAMES
SULLIVAN,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

On the 21st day of May, 1920, the United States Attorney for the Northern District of California filed an information numbered 8432 against Ben. J. Kathriner and James F. Sullivan, charging that the defendants did on the 23rd day of April, 1920, at San Francisco, violate Section 21 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, in that they maintained a common nuisance in that they did unlawfully, wilfully and knowingly keep on the premises situated at 1123 Folsom Street certain intoxicating liquor, to-wit, about one quart brandy containing one-half of one per cent or more of alcohol by volume.

The second count of the information charged that the defendants did on the 23rd day of April, 1920, at San Francisco, violate Section 3 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, in that they did unlawfully have in their possession for beverage purposes, certain intoxicating liquor, to-wit, about one quart of brandy containing one-half of one per cent or more of alcohol by volume.

The defendants interposed a demurrer to the information upon the ground that the information did not state a public offense against the defendants or either of them. On June 21, 1920, the demurrer to the information was overruled.

Thereafter the defendants entered a plea of not guilty to the information. On the 23rd day of September, 1920, the defendants were tried before a jury and the jury returned a verdict on said day, finding the defendants not guilty on the second count of the information, but guilty on the first count of the information. In other words, the defendants were found not guilty of the count charging the unlawful possession of intoxicating liquor, but were found guilty of maintaining a common nuisance in that they had unlawfully in their possession intoxicating liquor at the time and place charged in the information.

Thereafter, on the 25th day of September, 1920, the defendants interposed a motion for a new trial, which was denied, and a motion in arrest of judgment, which was also denied. Thereupon judgment was rendered, sentencing the defendant James F. Sullivan to be imprisoned for a period of three months and defendant Ben J. Kathriner to be imprisoned for a

period of six months in the county jail of San Francisco. A writ of error was thereupon sued out by the defendants to review the judgment and proceedings of the trial court.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

1. The Court erred in denying the motion of defendants in arrest of judgment upon the ground that the first count of the information does not state facts sufficient to constitute a public offense. This point was also raised by the demurrer filed to the information and also by a motion for a directed verdict of not guilty made at the close of the Government's case.

2. The Court erred in denying the motion of the defendants for a directed verdict of not guilty upon the ground that the evidence offered did not establish the commission by the defendants of a public offense against the laws of the United States.

3. The Court erred in overruling the objection of the defendants to the admission in evidence of the alleged liquor seized upon the premises of the defendants at the time of their arrest. The evidence disclosed that the prohibition officers went into the soft drink establishment of the defendants about half-past twelve on the 20th day of April, 1920, walked up to the bar, told the bartender who they were and jumped over the bar and made a search of the premises and seized a small quantity of liquor in a pitcher behind the bar. (Trans., fol. 21.) The officers testified that

they did not have any search warrant and made the search of the premises without a warrant. (Trans., fols. 24-28.)

ARGUMENT.

1. The defendants maintain that the first count in the information does not state facts sufficient to constitute a public offense in that the possession of intoxicating liquors is not a violation of any valid law of the United States. It is alleged in the first count that the defendants maintained a common nuisance in that they unlawfully kept on their premises certain intoxicating liquor. The 18th Amendment to the Constitution of the United States does not prohibit the possession of intoxicating liquors. It merely prohibits the manufacture, sale or transportation of intoxicating liquor.

The 18th Amendment reads as follows:

Section 1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Congress has no power to enact any legislation prohibiting the use of intoxicating liquor within the States save in so far as the power was granted to it by the 18th Amendment to the Constitution. Sections 3 and 21 of the Volstead Act in so far as they

prohibit the possession of intoxicating liquor are unconstitutional for the reason that the 18th Amendment nowhere delegates such power to the Congress but merely authorizes legislation prohibitory of the manufacture, sale and transportation of intoxicating liquors.

In the United States the sovereignty is vested in the people. By the Constitution of the United States certain powers have been delegated by the people to the Federal Government. And so it has been well said by Judge Storey in the case of *Martin vs. Hunter*, 1 Wheat. 323:

“The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically as the preamble of the constitution declares, by ‘The People of the United States.’ There can be no doubt that it was competent for the people to invest the general government with all the powers which they might deem proper or necessary; to extend or restrain those powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that ‘the powers not delegated to the United States by constitution nor prohibited by it to the states,

are reserved to the states respectively or to the people'.

"The government then of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted must be *such* as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms, and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context, expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

Being therefore a government of restricted and enumerated powers, the Congress had no greater authority to legislate upon the subject of prohibition than was granted to it by the language of the 18th Amendment. That language is not ambiguous and clearly prohibits merely the manufacture, sale or transportation of intoxicating liquors. And, accordingly, Congress is by Section 2 of the Amendment merely empowered to enforce the article by legislation appropriate to bring about a prohibition of the manufacture, sale or transportation of intoxicating liquors. No power whatever is granted to Congress to prohibit the possession of intoxicating liquor. Nor can it be said that the legislation prohibiting the possession of intoxicating liquor is justified by Section 2 of the Amendment, for it cannot reasonably be maintained to be necessary to prohibit the possession of intoxicating liquor in order to efficiently legislate against its sale, manufacture or transportation.

Furthermore, the omission of a prohibition against possession of intoxicating liquor in the 18th Amendment was undoubtedly a premeditated and intentional one. Millions of dollars were invested in intoxicating liquors at the time of the adoption of the 18th Amendment and to prohibit the possession of this property except under very restricted conditions, may well be said to be tantamount to the confiscation of it. It is but reasonable to conclude that the people in adopting the 18th Amendment had in mind the prohibition of all further manufacture of and commerce in intoxicating liquors but at the same time intended that those having possession of intoxicating liquors might retain possession of them and use them until the stock was exhausted.

“An intention to take away or destroy individual rights is never presumed, and to give effect to a design so unjust and so unreasonable would require the support of the most direct and explicit affirmation declarative of such intent.”

Chance vs. Marion County, 64 Illinois 66.

An examination of the authorities bearing upon prohibition legislation heretofore adopted by the various States sheds little or no light upon the precise question involved in the case at bar. The State legislatures, of course, have all the powers not delegated to the United States nor prohibited by the Federal Constitution to the States. Accordingly prohibition enactments even of the most drastic kind, adopted by various State legislatures have been up-

held as a proper exercise of the police powers of the States. Congress, however, has no such power.

Mugler vs. Kansas, 132 U. S. 623.

In the case of *State v. Gilman*, 33 West Va. 146, the defendant was charged with having liquor in his possession. The State Constitution provided "that laws might be passed regulating or prohibiting the sale of intoxicating liquors within the State". The Legislature passed a law prohibiting among other things, "the keeping in one's possession, for another, of spirituous liquors". The question presented was whether this provision came within the purview of "regulating or prohibiting the sale of spirituous liquors". The Supreme Court of West Virginia held that it did not, saying in the course of an able opinion:

"By granting an express authority to the legislature to regulate or prohibit the sale, there is an implied inhibition to the exercise of any authority in respect to that subject which is not embraced in the grant. This rule is simply an application of the old maxim, *expressio unius est exclusio alterius*, which Lord Bacon concisely explains by saying: 'As exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated.' The express power here given to regulate or prohibit the sale of liquors, unless it was intended to limit the legislative authority, would render this provision of the Constitution wholly nugatory and useless; because as we have seen without this provision, the legislature would have had plenary power over the whole subject. . . .

"From what we have said, it is apparent that the provisions of the statute under consideration are not a fair and reasonable exercise of the police

power, NOR HAS IT ANY REFERENCE TO THE PROHIBITION OR SALE OF LIQUOR. IT IS SIMPLY AN ATTEMPT TO MAKE THE POSSESSION OF LIQUOR FOR ANY PURPOSE A CRIME. A very different question would have been presented if the act had made it unlawful for any person to keep intoxicating liquor in his possession, either for himself or for another, for the purpose of selling it, or as a device to evade the revenue laws. But this provision has nothing in it of the kind. It makes the mere possession for another, without regard to the intent or purpose of either the possessor or of the person for whom it is kept, a crime."

Another case upon the same point is *EX PARTE FRANCIS*, decided by the Supreme Court of Florida Aug. 13, 1918 and reported in 79 So. 753. In that case, the defendant was charged among other things, with having had possession of an excessive quantity of liquor in dry territory. The Court in deciding that while under the Constitution, the legislature could prohibit the sale of liquor, yet it exceeded its power in denying the right of possession, said:—

"Section 1 of Art. 19 of our Constitution reserves to the people the right by their direct vote to prohibit the sale only of intoxicating liquors, NOT THEIR OWNERSHIP, POSSESSION OR INDIVIDUAL USE BY THE CITIZEN, and by the second section of the Article, the legislature is expressly authorized and required to enact laws to carry out the provisions of Section 1; that is to enforce the prohibition against the sale, AND WHEN THE LEGISLATURE GOES OUTSIDE THE REALM OF LAW AIMED AT PROHIBITING THE UNLAWFUL SALE OF SUCH LIQUOR, BY IN-

HIBITING THEIR PRIVATE OWNERSHIP, POSSESSION OR PERSONAL USE, IT TRANSCENDS ITS AUTHORITY UNDER THE CONSTITUTION."

In 15 R. C. L. Sec. 19, it is said:

"Generally speaking it is the traffic and not the liquor itself which is subject to the police power; and the property right, the privilege of the individual to acquire and use liquors to satisfy his own personal tastes and appetites should remain inviolate. It has been held generally that the mere possession and use for such purposes are not inherently injurious to the health, morals or safety of the public, and therefore that legislation prohibiting such acts is not a legitimate exercise of police power, but on the contrary is an abridgment of immunities of the citizen without any legal justification, and as such, void. . . ."

So also in JOYCE on Intoxicating Liquors, we find the statement:—

"A constitutional provision that 'laws may be passed regulating or prohibiting the sale of intoxicating liquors' is held to impose a restraint upon the plenary and unrestricted power of a legislature to deal with the subject of such liquors in any manner it chooses to. IN SUCH A CASE IT IS DECLARED THAT THE PURPOSE AND EFFECT OF THE PROVISION IS TO RESTRICT AND LIMIT THE LEGISLATIVE AUTHORITY TO THE POWERS EXPRESSLY GRANTED THEREIN, THAT IS TO THE POWER TO REGULATE AND PROHIBIT THE SALE, the rule being said to be simply an application of the maxim, '*expressio unius est exclusio alterius*'."

Joyce on Intoxicating Liquors, Sec. 79.

And as it has also in many jurisdictions been held to be an unlawful exercise of the police power of a State to prohibit the possession of intoxicating liquor; how much more unwarranted is this exercise of power by Congress, whose authority is much more limited than that of State Legislatures and is confined under the 18th Amendment to the enactment of appropriate legislation prohibiting the sale, manufacture or transportation of intoxicating liquors.

Joyce on Intoxicating Liquors, Sec. 85;
Comm. v. Campbell, 117 S. W. 385;
State v. Fitzpatrick, 16 R. I. 54.

And in the recent case of *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, the Court in upholding the legality of the possession of lawfully acquired liquor in a safe deposit vault stated:—

“The Congress was concerned with the great problem of preventing the manufacture and sale of intoxicating liquors for beverage purposes in the future and it seems to have given but slight attention to the consumption of such relatively small amounts of such liquors as might be in existence in private ownership and intended for consumption by the owner, his family or his guests, when the amendment and the Act should take effect.

“An intention to confiscate private property even in intoxicating liquors will not be raised by inference, and construction from provisions of law which have ample field for other operation, in effecting a purpose clearly indicated and declared.”

And Justice McReynolds in his concurring opinion in the same case said:—

"I think the Volstead Act was properly interpreted by the Court below; but to enforce it as thus construed would result in virtual confiscation of lawfully acquired liquors by preventing or unduly interfering with their consumption by the owner. *The Eighteenth Amedment gave no such power to Congress. Manufacture, sale and transportation are the things prohibited—not personal use.*"

2. The trial Court erred in overruling the objection of defendants to the admissibility of the liquor in evidence for the reason that it was obtained through an unlawful search and seizure, made without a search warrant.

The testimony showed that the officers entered the soft drink parlor of the defendants and without a warrant or process of any kind, jumped over the bar and made a search, seizing a small quantity of liquor behind the bar. (Trans. fols. 24-28.)

Section 25 of Art. II of the Volstead Act provides for the issuance of search warrants as provided in the Act of Congress, approved June 15th, 1917. In addition it limits the issuance of search warrants for private dwellings to cases where the dwelling is being used for actual sales of intoxicating liquor or is in part used for business purposes, such as a store, shop, saloon, restaurant, hotel or boarding house. Accordingly it was necessary for the officers to have obtained a search warrant before making any search and seizure of the property on the premises of defendants and not having done so under the provision of the 4th and 5th Amendments to the Constitution of the United States the property seized was not admissible in evidence against the defendants.

In discussing the necessity of a search warrant under the Volstead Act the District Court of the Eastern District of Pennsylvania in the case of *United States vs. Crossen*, 267 Fed., page 459 said:—

“A careful analysis of the Act makes it apparent that in no case is a Prohibition officer or agent justified in seizing liquor or other property without a search warrant, except as provided in Section 26, which makes it his duty to seize all intoxicating liquors found being transported contrary to law in any wagon, buggy, automobile, water or air craft or other vehicle.”

And also in the case of *United States vs. Bush*, 269 Fed 457, the Court said:—

“Hence a search for stolen goods upon a valid warrant and seizure is a legal procedure, but a search and seizure is illegal and unreasonable under the Fourth Amendment of the Constitution, when conducted without first obtaining a legal warrant upon probable cause, supported by oath or affirmation, and as the constitution provides, particularly describing the place to be searched and the person or things to be seized. Evidence obtained by an invalid search and seizure to prove possession is in effect a requirement that the accused be a witness against himself.

Silverthorne Lumber Co., Inc., vs. *U. S.* 251 *U. S.* 385;

Flagg vs. U. S. 233 Fed. 481;

“Indeed, in the Flagg case clues, leads and information developed from an illegal search and seizure were held inadmissible against the defendant.”

Edelstein vs. U. S. 149 Fed 636;

See also *Gouled vs. U. S.* 41 Supreme Court Reporter 261;

Amos vs. U. S. 41 Supreme Court Reporter 266;
Weeks vs. U. S. 232 U. S. 383;
U. S. vs. Kelih, 272 Fed. Reporter 484."

Agent Hanley in his testimony stated that they did not have a search warrant and said that they did not require any, as the premises of the defendants were a saloon and public place (Trans. fol. 28.) We respectfully submit that even a saloon is protected from an unlawful search and seizure of property therein by the provisions of the 4th and 5th Amendments to the Constitution of the United States. In the case of *Amos vs. U. S.*, 41 Supreme Court Reporter 261, the officers entered the store of the defendants and yet the seizure was held to be an unreasonable and improper one.

Neither can it be contended here that because defendants did not move for the return of the seized property before the trial, their objection to its admissibility in evidence was correctly overruled. If this property was unlawfully seized from the defendants through an illegal search of their premises then under the 5th Amendment to the Constitution to admit it in evidence on their trial of a criminal charge, was tantamount to compel them to be witnesses against themselves. Moreover the rule that a motion for a return of the property seized should be made before the trial is only a rule of procedure and is not to be applied as a hard and fast formula to every case. This is the exact expression used in the case of *Gouled vs. U. S.*, *supra*, in which the Court said:—

"While this is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a

hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

The officers of the Government in the case at bar were manifestly of the opinion that they could enter premises and make searches and seizures without obtaining any warrant and without regard to the Constitutional rights of the owners of the premises. To permit a conviction of the defendants upon such evidence to be sustained would constitute a flagrant violation of the rights secured to the defendants by the 4th and 5th Amendments to the Constitution of the United States.

In the case of *Gouled vs. U. S.*, the Court in emphasizing the importance of an adherence to the requirements of the 4th Amendment said:—

"It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B. 834, Ann. Cas. 1915C. 1177, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319) have declared the importance to political liberty and to the welfare of our country of

the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

For the foregoing reasons, I submit the judgment of the trial Court should be reversed.

Respectfully submitted,

FRANK J. HENNESSY,
Attorney for Plaintiffs in Error.

No.

35-10

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT DAVIS and O. A. DODSON,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.**

FILED
JUL 11 1901
F. D. HUNTER
CLERK

No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Plaintiffs in Error:

ALBERT SCHOONOVER, Esq., ~~Los Angeles,~~ ^{San Diego}
California.

For Defendant in Error:

ROBERT O'CONNOR, Esq., United States Attorney; T. F. GREEN and B. B. CRANE, Esqs., Assistant United States Attorneys Federal Building, Los Angeles, California.

Citation.

United States of America, ss.

To The United States of America,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 16th day of November A. D. 1920, pursuant to a writ of error sued out in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain case wherein Robert Davis and O. A. Dodson are plaintiffs in error and you are defendants in error to show cause, if any there be, why the judgment and sentence in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Oscar A. Trippet
United States District Judge for the Southern District of California, this.....day of
October, A. D. 1920, and of the Independence
of the United States, the one hundred and
forty fifth.

Trippet

U. S. District Judge for the Southern District of
California.

[Endorsed]: 2320 Crim. *In the United States
Circuit Court of Appeals for the NINTH CIRCUIT
Robert Davis and A. O. Dodson Plaintiffs in Error.*

vs. The United States of America, Defendants in Error. Citation Received copy of the within. Gordon Lawson As'st U. S. Atty. 10/19/20. FILED Oct 19 1920 CHAS. N. WILLIAMS, Clerk Louis J. Somers, Deputy

Writ of Error.

United States of America, ss.

The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California,
GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between The United States of America and Robert Davis and O. A. Dodson, No 2320 Crim. a manifest error hath happened, to the great damage of the said Robert Davis and O. A. Dodson as by their complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 16th

day of November, 1920, next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. EDWARD D. WHITE,
Chief Justice of the United States, this 18th
day of October in the year of our Lord one
(Seal) thousand nine hundred and twenty and of
the Independence of the United States the
one hundred and forty fifth.

Chas. N. Williams
Clerk of the District Court of the
United States of America, in and
for the Southern District of Cali-
fornia.

The above writ of error is hereby allowed.

Trippet
Judge.

I hereby certify that a copy of the within Writ of Error was on the 18th day of October, 1920, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Chas. N. Williams
Clerk of the District Court of the
United States for the Southern
District of California.

[Endorsed]: United States Circuit Court of Appeals *for the* NINTH CIRCUIT Robert Davis and A. O. Dodson *Plaintiffs in Error vs. The United States of America Defendants in Error* Writ of Error FILED OCT 18 1920 Chas N. Williams CHAS N. WILLIAMS, Clerk By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMER-)	
ICA,		No. 2320 Crim.
	Plaintiff,)	
vs.		ORDER
ROBERT DAVIS, O. A. DOD-)	
SON, et al.,		ALLOWING
	Defendants.)	
		WRIT OF ERROR.

Upon motion of Albert Schoonover, Esq., Attorney for the defendants O. A. Dodson and Robert Davis, in the above entitled action, and upon filing the petition for a Writ of Error and Assignment of Errors.

IT IS ORDERED that a Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein; that pending the decision upon said Writ of Error the supersedeas prayed for by the aforesaid defendants in their petition for Writ of Error is hereby allowed, and the said defendant, Robert Davis, is ad-

mitted to bail upon said Writ of Error in the sum of \$10,000.00, and the said defendant, O. A. DODSON, is also admitted to bail upon said Writ of error in the sum of \$2,000.00, upon the bond heretofore approved and filed herein.

Trippet

Judge of the District Court.

Dated October 18 1920.

[Endorsed]: *No.* 2320 Crim. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Southern District of California, Southern Division. UNITED STATES OF AMERICA, Plaintiff, *vs.* Robert Davis, O. A. Dodson, et al., Defendants. ORDER ALLOWING WRIT OF ERROR FILED OCT 19 1920 CHAS. N. WILLIAMS, Clerk Louis J. Somers Deputy 7-754

Indictment.

No. —

Filed: —

Viol: Sec. 37, FPC, Conspiracy, to violate Act of Oct. 28, 1919.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

At a stated term of said Court, begun and holder at the City of Los Angeles, County of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the

year of our Lord one thousand nine hundred and twenty;

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That ROBERT DAVIS, O. A. DODSON and ADOLFO C. OLIVAS, whose full and true names are, and the full and true name of each of whom is, to the Grand Jurors unknown, and various and sundry other persons whose names are to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore to-wit, on or about the 18th day of July, 1920, and during all of the times thereafter up to and including the time of the filing of this indictment, at or near El Centro, County of Imperial, and at or near Calexico, County of Imperial, within the State and Southern Division of the Southern District of California and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, corruptly, fraudulently and feloniously, conspire, combine, confederate, and agree together and with various and sundry other persons to the Grand Jurors unknown, to commit an offense against the United States, to-wit: the offense of knowingly, wilfully and unlawfully transporting, selling, bartering, furnishing and possessing intoxicating liquors, namely, whiskey, containing alcohol in excess of one-half of one percent by volume in violation of the Act of Congress entitled, "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits

for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries", commonly known as the "National Prohibition Act of October 28, 1919."

And the said defendants, ROBERT DAVIS, O. A. DODSON and ADOLFO C. OLÍVAS, at the time they so conspired, confederated and agreed together then and there well knew that it was unlawful to transport, sell, barter, furnish and possess said whiskey.

OVERT ACT NO. 1.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of said conspiracy and to effect and accomplish the object and purpose thereof, at or near El Centro, California, within the jurisdiction of the United States and this Honorable Court, the said defendant, ROBERT DAVIS, on or about the 20th day of July, 1920, did counsel and advise said defendant ADOLFO C. OLIVAS to go from said El Centro to Calexico, and did then and there knowingly, wilfully and unlawfully furnish said ADOLFO C. OLIVAS with horses and a wagon for the purpose of traveling to said Calexico and for the purpose then and there of obtaining said whiskey.

OVERT ACT NO. 2.

And the Grand Jurors aforesaid on their oath aforesaid do further present:

That in furtherance of said conspiracy and to effect and accomplish the object and purpose thereof, at or near Calexico, within the jurisdiction of the United States and of this Honorable Court, the said defendant, Robert Davis, on or about the 20th day of July, 1920, did knowingly, wilfully and unlawfully advise, counsel and abet said Adolfo C. Olivas to go to a place near Calexico, California, where intoxicating liquors, to-wit: thirteen five-gallon demijohns of whiskey containing alcohol in excess of one-half of one percent by volume, were hidden.

OVERT ACT NO. 3.

And the Grand Jurors aforesaid on their oath aforesaid, do further present:

That in furtherance of said conspiracy and to effect and accomplish the object and purpose thereof, at or near Calexico, California, within the jurisdiction of the United States and of this Honorable Court, the said defendant, Robert Davis, on or about the 20th day of July, 1920, did knowingly, wilfully and unlawfully advise, counsel and abet said Adolfo C. Olivas, to knowingly, wilfully and unlawfully transport and attempt to transport thirteen five-gallon demijohns of whiskey containing alcohol in excess of one-half of one percent by volume from at or near Calexico, California, to the ranch of said Robert Davis, which said ranch was at or near said El Centro, California, and within the jurisdiction of the United States and of this Honorable Court.

OVERT ACT NO. 4.

And the Grand Jurors aforesaid on their oath aforesaid do further present:

That in furtherance of said conspiracy and to effect and accomplish the objects and purpose thereof, at or near Calexico, California, and within the jurisdiction of the United States and of this Honorable Court, on or about the 20th day of July, 1920, said defendants Adolfo C. Olivas and O. A. Dodson did knowingly, wilfully and unlawfully put into said wagon and did knowingly, wilfully, and unlawfully possess and transport and convey and attempt to possess and transport and convey thirteen five-gallon demijohns of whiskey containing alcohol in excess of one-half of one percent by volume from at or near said Calexico, California, to the ranch of said Robert Davis, which said ranch was at or near Calexico, and within the jurisdiction of the United States and of this Honorable Court.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

Robert O'Connor

United States Attorney.

Burton Briggs Crane

Assistant U. S. Attorney.

[Endorsed]: No. 2320 Crim UNITED STATES DISTRICT COURT, Southern *District of* California, Southern *Division*. THE UNITED STATES OF AMERICA *vs.* ROBERT DAVIS, O. A. DODSON, and ADOLFO C. OLIVAS, INDICTMENT Viol.

Sec. 37, FPC, Conspiracy, to viol. Act of Oct. 28, 1919.

A true bill, Leo S. Chandler *Foreman*. FILED SEP

10 1920 CHAS N. WILLIAMS, Clerk By Wm U.

Handy Deputy Clerk

Bail \$—————

Davis - \$ 10,000

Olivas —————

Dodson - \$ 1,000

7-433

At a stated term, to wit: the September Term, A. D., 1920, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of San Diego, on Monday, the Thirteenth day of September, in the year of our Lord one thousand nine hundred and twenty;

Present:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2320 Crim.
Robt. Davis and O. A. Dodson,)	
	Defendants.)

This cause coming on at this time for the arraignment of defendants and for the entry of their plea, T. F. Green, Esq., Assistant U. S. Attorney, appearing for plaintiff; M. V. Wilson, Esq., appearing for defendants; and defendants Robt. Davis and O. A. Dod-

son being present on bond and having been called and arraigned and having stated their true names to be as given in the Information; and having requested that the Information be read, and the court having read the Information; on motion of T. F. Green, Esq. it is ordered that the bond of defendant O. A. Dodson be, and the same hereby is fixed at \$10,000.00, and it is further ordered that this case be, and the same hereby is continued to 2 o'clock P. M., Tuesday, Sept 14, for entry of plea.

At a stated term, towit: the September Term A. D. 1920, of the District Court of the United States of America within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of San Diego, on Tuesday, the Twenty-first day of September, in the year *or* our Lord One thousand nine hundred and twenty:

Present:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,)	
	) Plaintiff,	
vs.	)	No. 2320 Crim.
)	
Robt. Davis and O. A. Dodson,)	
	) Defendants.	

This cause coming on this day to be tried before the court and a jury to be impanelled as to defendants Robt. Davis and O. A. Dodson; T. F. Green, and B. B.

Crane, Esqs., Assistant U. S. Attorneys, being present for the Government; O. V. Wilson, Esq., being present for the defendants; and both defendants being present on bail; and both sides having answered ready, it is now by the court ordered that a jury be impanelled herein; and thereupon the names of the following petit jurors having been duly drawn from the box, and called, and sworn on their voir dire, to wit: Wm. S. Neal, Geo. L. Barney, G. W. Fryatt, J. Don Dunann, Tony Iverson, Julian F. Wire, Albert J. Rinehart, Geo. E. Spainhome, Willard M. Doubleday, Fred A. Schneider, John G. Burgess, and A. Ellis Barron; and said petit jurors having been examined by the court, and counsel for respective parties; and Wm. S. Neal having been excused by the court for cause; and the name of one other petit juror having been drawn from the box and called and sworn, to wit F. L. Nason, and examined by the court and counsel for the respective parties, and said jurors now in the box having been passed for cause, and counsel for the Government not desiring to exercise any peremptory challenges; and J. Don Dunann, A. Ellis Barron, G. W. Fryatt, George L. Barney, Willard M. Doubleday, and John H. Burgess having been peremptorily challenged by counsel for defendant and excused by the court; and the court having ordered that six other petit jurors be drawn from the jury box; and the names of the following six petit jurors having been drawn and called, and said jurors having been sworn on their voir dire, to wit: Arren L. Nash, Horace Aughe, W. Clark Weitzel, Albert H. Kayser, Edwin J. Swayne, and Herbert M.

Hayes; and said jurors having been examined by the court and counsel for the respective parties and passed for cause; and Norman E. Martin, having been peremptorily challenged by counsel for the Government, and by the court excused; and the name of one other petit juror having been drawn from the box and called and sworn on his voir dire, to wit: Burton L. Forbes, and said juror having been examined by the court and counsel for respective parties and passed for cause; and said juror having been peremptorily challenged by counsel for Government and by the court excused; and the name of one other petit juror having been drawn from the box and said juror having been sworn on his voir dire, to wit: James Middleton, and said juror having been examined by the court and counsel for respective parties and passed for cause; and the said jurors now in the box having been accepted by counsel for respective parties as the jury to try this case, said jury as so impanelled and sworn consisting of the following named persons, to wit:

- | | |
|---------------------|-----------------------|
| 1. F. L. Nason | 7. Albert J. Rinehart |
| 2. Lee R. Jennings | 8. Geo. E. Spainhome |
| 3. W. Clark Weitzel | 9. Guey E. Pearl |
| 4. Arren L. Nash | 10. Fred A. Schneider |
| 5. Tony Iverson | 11. Herbert M. Hayes, |
| 6. Julian F. Weir | 12. James Middleton. |

and the Indictment having been read to the jury; and now, at the hour of 11:12 o'clock A. M., the jury thereupon having been cautioned and admonished by the court not to talk to anyone about the case, or any matter connected therewith, or permit anyone to talk to them about the case, or any matter connected there-

with, or to talk with each other about the case, until it is finally submitted to them under the instructions of the court; and the court having thereupon at the hour of 11:12 o'clock A. M., taken a recess for eight minutes; and

Now at the hour of 11:20 o'clock A. M., the court having reconvened and both defendants being present as before, and counsel for respective parties being present, and W. C. Wren, being present as shorthand reporter of the proceedings and testimony; and the court having announced the jury as all present; and ordered the trial proceeded with; and

W. T. Harris, having been called and sworn, and having testified on behalf of the Government; and

The following exhibits having been offered in connection with said testimony in evidence, same are admitted and ordered filed herein, to wit:

U. S. Ex. 1. -5- gal. Demijohn of Whiskey

“ “ 2. “

“ “ 3. “

“ “ 4. “

“ “ 5. “

“ “ 6. “

“ “ 7. “

“ “ 8. “

“ “ 9. “

“ “ 10. “

“ “ 11. “

“ “ 12. “

“ “ 13. “

“ “ 14. Various Sacks.

and E. R. Brown, and A. C. Olivas having been respectively called and sworn and having testified respectively on behalf of the United States; and

Now, at the hour of 12 o'clock noon, the court having admonished the jury in the usual manner, a recess is taken to the hour of 2 o'clock P. M., of this day; and

Now, at the hour of 2 o'clock P. M., the court having reconvened and all being present as before, and W. C. Wren, being present as shorthand reporter of the proceedings and testimony; and the court having announced the jury as all present and having ordered the trial proceeded with; and

A. C. Olivas, a witness heretofore sworn, having resumed the stand and having testified further on behalf of the Government; and

In connection with the said testimony, the following exhibit having been offered in evidence, same is admitted and filed, to wit:

U. S. Ex. 15 - Agreement between M. B. Davis, A. C. Olivas, and Felix Olivas; and

Ike Ruiz and Augustine P. Nazobelle, having been respectively called and sworn, and having testified on behalf of the Government; and

Now at the hour of 3:40 o'clock P. M., the court having duly admonished the jury, now orders that a recess be taken for five minutes; and

Now at the hour of 3:45 o'clock P. M., the court having reconvened and all being present as before, and W. C. Wren, being present as shorthand reporter of the proceedings and testimony, and the court having

announced the jury as all present, and having ordered that the trial be proceeded with; and

Manuel Marcus, having been called and sworn, and having testified on behalf of the Government thru the Spanish interpreter, Geo. Courts; and

Felix Olivas, having been called, and sworn, and having testified on behalf of the Government; and

Now, on motion of T. F. Green, Esq., Assistant U. S. Attorney, of counsel for the Government; as aforesaid, and good cause appearing therefor, it is by the court ordered that twelve 5-gallon Demijohns of liquor now in evidence be delivered to R. F. Gussweiler, for safe keeping, and one Demijohn to remain in the custody of the clerk; and

Now, at the hour of 4:35 o'clock, P. M., the court having duly *admonhsed* the jury in the usual manner, now orders that a recess be taken until Wednesday, Sept. 21, 1920, at the hour of 10 o'clock, A. ., and that this cause be, and the same hereby is continued to that time for further trial.

At a stated term, towit: the September Term, A. D., 1920, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the Court Room thereof, in the City of San Diego, on Wednesday, the Twenty-second day of September, in the year of our Lord One Thousand nine hundred and twenty;

Present:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,)	
	Plaintiff,)
vs.	)	No. 2320 Crim.
)	
Robert Davis and O. A. Dodson,)	
	Defendants.)

This cause coming on at this time for further trial before the Court, and a jury heretofore impanelled herein; and defendants Robert Davis, and O. A. Dodson being present on bail, together with their attorney, O. V. Willson, Esq.; and T. F. Green, Esq., Assistant U. S. Attorney, and B. B. Crane, Esq., Assistant U. S. Attorney, appearing for the Government; and W. C. Wren, being present as shorthand reporter of the proceedings and testimony; and the roll of the jury having been called, and all being present, and the court having ordered the trial proceeded with; and

Luz Olivas, having been called and sworn, and having testified on behalf of the Government thru the court interpreter, Geo. Coutts; and

D. B. Sidaris, E. S. Boucher, W. P. Conkling, having been respectively called and sworn and having testified on behalf of the Government; and

A. C. Olivas, Felix Olivas, witnesses heretofore sworn, having been recalled, and having testified further on behalf of the Government; and

Now, the Government having no further testimony to offer, rests; and

Now at the hour of 10:55 o'clock A. M., O. V. Willson, Esq., of counsel, as aforesaid for the defendants, having requested that the jury be excused; and

The jury having been admonished in the usual manner by the court, is excused from the court room; and

O. V. Willson, Esq., having moved the court that this action be dismissed, and having argued in support of said motion; and

Now, at the hour of 11:00 o'clock / A. M., it is ordered that a recess be taken for 10 minutes; and

Now, at the hour of 11:10 o'clock, A. M., the court having reconvened, and all being present as before, and W. C. Wren, being present as shorthand reporter of the proceedings and testimony; and the court having announced the jury all present, and having ordered that the trial be proceeded with; and

Now at this time it is by the court ordered that the defendants motion for dismissal be denied, and that an exception be noted for defendants, and

M. B. Davis, O. A. Dodson, W. F. McCullum, Mark M. Rose, having been respectively called and sworn, and having testified on behalf of the defendants; and

Now at the hour of 11:50 o'clock A. M., the defendants having no further testimony to offer, rests; and

The Government having no rebuttal testimony to offer, rests; and

Now, at the hour of 11:55 o'clock, A. M., B. B. Crane, Esq., Assistant U. S. Attorney, of counsel as aforesaid for the Government, having presented the opening argument on behalf of the Government; and

Now, at the hour of 12:07 o'clock P. M., the court having duly admonished the jury now orders that a recess be taken to the hour of 1:00 o'clock P. M.; and

Now, at the hour of 1:00 o'clock P. M., the court having reconvened and all being present as before, W. C. Wren, being present as shorthand reporter of the proceedings and testimony; and the court having announced the jury as all present; and having ordered the trial proceeded with; and

O. V. Willson, Esq., of counsel for the defendants, having presented the argument on behalf of the defendants; and

Now at the hour of 1:25 o'clock P. M., T. F. Green, Esq., Assistant U. S. Attorney, having presented the closing argument on behalf of the Government; and

Now, at the hour of 1:40 o'clock P. M., the court having given *it's* instructions to the jury, and O. V. Willson, Esq., of counsel as aforesaid for defendants having excepted to certain instructions and refusal of court to give certain requested instructions; and

Now, at the hour of 2:00 o'clock P. M., Tom Kilty, a Deputy U. S. Marshall, having been sworn to take charge of the jury, and the jury in charge of the said sworn bailiff, having retired to consider of their verdict; and

Now, at the hour of 2:30 o'clock P. M., the jury having returned into court and having been asked if they have agreed upon a verdict, and said jury, through their foreman, having replied, they have; and having presented a verdict, which verdict is read by the Clerk

and ordered filed herein, said verdict as so read and filed being as follows, to-wit:

"IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. United States of America, Plaintiff, vs. Robert Davis, and O. A. Dodson, Defendants. No. 2320 Crim. S. D. We, the Jury in the above entitled cause find the defendant ROBERT DAVIS GUILTY as charged in the indictment; and the defendant O. A. Dodson GUILTY as charged in the Indictment. San Diego, California, September 22nd, 1920. F. A. Schneider, Foreman." and good cause appearing therefor, it is ordered that this cause be, and the same hereby is continued to the hour of 4:00 o'clock, P. M., for sentence of defendants; defendant O. A. Dodson to remain in court until that time; and

Now, at the hour of 4:00 o'clock, P. M., both defendants being present and counsel for respective parties being present as before; and good cause appearing therefor, it is ordered that this cause be, and the same hereby is continued to Thursday, Sept. 23, at the hour of 4:00 o'clock, P. M., for imposing of sentence.

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

* * *

United States of America,)	
)	
Plaintiff,)	
)	
vs.	)	No. 2320 Crim. S. D.
)	
Robert Davis, and O. A.)	
Dodson,)	
Defendants.)	

We, the Jury in the above entitled cause find the defendant ROBERT DAVIS ——— GUILTY as charged in the Indictment; and the defendant O. A. DODSON ——— GUILTY as charged in the Indictment.

San Diego, California, September 22" 1920

F. A. Schneider.

Foreman.

FILED Sep 1920 CHAS. N. WILLIAMS, *Clerk*
By Fred E. Subith, *Deputy*

At a stated Term, to wit: the July Term of the District Court of the United States of America, within and for the Southern District of California, Southern Division, held at the Court Room thereof, in the city of Los Angeles, California, on Monday the 18th day of October, in the year

of our Lord One Thousand Nine Hundred and Twenty.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,)	
	) Plaintiff,	
vs.	)	No. 2320 Crim.
Robert Davis, et al.,)	
	) Defendant.	

This cause coming on at this time for the imposing of sentence; Herbert M. Ellis, Esq., Assistant U. S. Attorney, appearing for the Government; and O. V. Willson and Albert Schoonover, Esqs., being present as counsel for the defendants Robert Davis and O. A. Dodson; said defendants being present in court; and Herbert M. Ellis, Esq., of counsel as aforesaid, having presented further argument on behalf of the Government; and Albert Schoonover, Esq., of counsel as aforesaid, having replied thereto on behalf of the defendants; it is now by the court ordered that the motion in arrest of Judgment be, and the same hereby is denied, and that an exception be reserved in favor of the defendants; and the court now pronounces sentence upon defendants Robert Davis and O. A. Dodson, for the crime of which they now stand convicted, namely: Viol. Sec. 37, F. P. C., Conspiracy to violate Act of Oct. 28, 1919, National Prohibition Act; and the judgment of the court is that defendant O. A. Dodson, be committed to the Los Angeles County Jail for the term and period of 9 months; and that defend-

ant Robert Davis be committed to the Los Angeles County Jail for the term and period of 12 months.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

United States of America,)	
Plaintiff,)	
)	
vs.	)	No. 2320 Crim.
)	
Robt. Davis and O. A. Dodson,)	
Defendants.)	

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original JUDGMENT entered in the above entitled cause; and I do further certify that the papers hereto annexed, constitute the Judgment Roll in said cause.

ATTEST my hand and the seal of said
District Court this Twenty Sixth
(Seal) day of October, A. D., 1920.

CHAS. N. WILLIAMS, Clerk,
By Fred E Subith

Deputy Clerk.

[Endorsed]: Original. No. 2320 Crim. In the District Court OF THE UNITED STATES for the Southern District of California Southern Division United States of America, Plaintiff, *vs.* Robert Davis

and O. A. Dodson, Defendants JUDGMENT ROLL
 Filed Oct 26 1920 Chas. N. Williams Clerk By Fred
 E. Subith Deputy Clerk Recorded Minutes Book No
 38 Page 65

IN THE DISTRICT COURT OF THE UNITED
 STATES IN AND FOR THE SOUTHERN
 DISTRICT OF CALIFORNIA.

UNITED STATES OF)	
AMERICA,)	
)	
	)	Plaintiff,
)	
vs.	)	MOTION IN
)	
	)	ARREST OF
)	
	)	JUDGMENT.
)	
ROBERT DAVIS AND O. A.)	
DODSON, et al.,)	
)	
	)	Defendants.

Defendants Robert Davis and O. A. Dodson, move the Court for arrest of judgment on the verdict heretofore rendered herein on the ground that the indictment herein does not charge any offense against any law of the United States.

Schoonover & Winnek
 O. V. Willson
 Attorneys for the defendants
 Robert Davis and O. A. Dodson.

[Endorsed]: No 2320 DEPT. NO. _____
 IN THE DISTRICT COURT OF THE STATE OF

CALIFORNIA IN AND FOR THE COUNTY OF
 SAN DIEGO U. S. OF AMERICA, Plaintiff VS.
 ROBERT DAVIS AND O. A. DODSON, et al De-
 fendant MOTION IN ARREST OF JUDGMENT.
 Received a copy of the within Motion this 24th day of
 Sept, 1920 Robert O'Connor U. S. Atty Burton
 Briggs Crane Ass't Attorney for Plaintiffs. FILED
 SEP 23 1920 *Chas N. Williams, Clerk* Fred E Su-
 bith *Deputy* SCHOONOVER & WINNEK ATTOR-
 NEY FOR _____ 1106-8 FIRST NATIONAL
 BANK BLDG. Main 4608 SAN DIEGO, CALIFOR-
 NIA

IN THE DISTRICT COURT OF THE UNITED
 STATES, SOUTHERN DISTRICT OF
 CALIFORNIA, SOUTHERN
 DIVISION.

United States of America,	) No. 2320 Crim.
)
Plaintiff,	) Petition of the
)
vs.	) defendants
Robert Davis, O. A. Dodson, et al.	) Robert Davis and
	) O. A. Dodson for
Defendants.	) a Writ of Error

Your petitioners, O. A. Dodson and Robert Davis, defendants in the above entitled cause, bring this, their petition for a writ of error to the District Court of the United States, in and for the Southern District of California, and in that behalf, your said petitioners say:

That on the 18th day of October, 1920, there was made, given and rendered in the above entitled court

and cause a judgment against your petitioners whereby your petitioner, Robert Davis was adjudged and sentenced to serve twelve months in the county jail and your petitioner, O. A. Dodson to serve nine months in the county jail and your petitioners say that they are advised by their counsel and aver that there was and is manifest error in the records and proceedings had in said cause, and in the making, giving and entry of such judgments and sentences, to the great injury and damage of your said petitionery, and each of them, and each and all of which errors will be more fully made to appear by an examination of said records and by an examination of the Bill of Exceptions and the Assignment of Errors which is filed with this petition, and to that end that the judgments, sentences, and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners and each of them, pray that a writ of error may be issued, directed therefrom to the said District Court of the United States, for the Southern District of California, Southern Division, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had and to be had in said cause, and that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners and each of them.

And your petitioners make the Assignment of Errors filed herewith, upon which they, and each of them, will rely, and which will be made to appear by a return of the said record, in obedience to said Writ.

WHEREFORE your petitioners pray and each of them prays the issuance of a writ as herein prayed, and that the Assignment of Errors filed herewith may be considered as their Assignment of Errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that they and each of them be awarded a supercedeas upon said Judgment, and all necessary process, including bail.

Robert Davis

O. A. Dodson

Schoonover & Winnek

Attorneys for defendants.

O K as to form & sufficiency of sureties

Gordon Lawson

Ass't U. S. Atty.

[Endorsed]: No. 2320 Crim. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION United States of America, Plaintiff, vs. Robert Davis, O. A. Dodson, et al. Petition of the defendants Robert Davis and O. A. Dodson for a Writ of Error. FILED OCT 18 1920 Chas. N. Williams CHAS. N. WILLIAMS, Clerk By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES OF
AMERICA,

) No. 2320 Crim.

Plaintiff,) Assignment of

vs.) errors by O. A.

Robert Davis, O. A. Dodson, et al.) Dodson and
Defendants.) Robert Davis.

ROBERT DAVIS and O. A. DODSON, two of the defendants above named, and plaintiffs in error herein, having petitioned for an order from the above named Court permitting them to procure a writ of error therefrom directed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment and sentence made and entered in said cause against the said Robert Davis and *and* O. A. Dodson, plaintiffs in error and petitioners herein, now make and file with their said petition, the following assignments of error upon which they will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every one of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon them, and they say that in the record of the proceedings had in the above entitled cause, upon the hearing and determination thereof in the District Court of the United States for the Southern District of California,

Southern Division, there is manifest error in this, to-wit:

The District Court of the United States in and for the Southern District of California, Southern Division, erred in overruling the defendants motion in arrest of judgment.

I hereby certify that the foregoing assignment of errors are made on behalf of the petition for a writ of error herein and in my opinion well taken, and the same now constitute the assignment of errors upon the writ prayed for.

Schoonover & Winnek,
Attorney for defendants Robert Davis and O. A.
Dodson.

[Endorsed]: No. 2320 Crim. IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA SOUTHERN DIVISION UNITED
STATES OF AMERICA, Plaintiff, vs. ROBERT
DAVIS, O. A. DODSON, et al., Defendants. AS-
SIGNMENT OF ERRORS BY ROBERT DAVIS
& O. A. DODSON FILED OCT 18 1920 Chas N.
Williams CHAS N. WILLIAMS, Clerk. By ———
Deputy Clerk.

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

So. Div.

U. S.	}	CLERK'S OFFICE
v.		No. 2320
Robert Davis, et al.		Praeceptum

TO THE CLERK OF SAID COURT;

Sir:

Please issue a certified transcript of the record on writ of error in the above entitled case, said record to consist of the Judgment roll omitting instructions

Motion in arrest of judgment

Ruling on said motion

Petition for writ of Error

Assignment of Errors

Order allowing

Writ of Error

Citation

Bond on writ

Albert Schoonover

Atty for Plft in Error

[Endorsed]: No. 2320 Cr U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION United States of America vs Robert H. Davis et al PRAECIPE FOR transcript on appeal FILED JAN 8 1921 CHAS N. WILLIAMS, Clerk Louis J. Somers

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT
OF CALIFORNIA
(Southern Division)

UNITED STATES OF)	
AMERICA,)	
Plaintiff in Error,)	
vs.	)	No. 2320 Crim.
ROBERT DAVIS, et al.,)	
Defendants in Error.)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing

pages, numbered from 1 to inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by Defendants in Error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the Indictment, Motion in Arrest of Judgment, Ruling on said Motion, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Citation and Bond on Appeal.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to , and that said amount has been paid me by the Defendants in Error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America,

in and for the Southern District of California, Southern Division, this day of , in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-sixth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in and
for the Southern District of California.

By

Deputy.

No. 3640

United States
Circuit Court of Appeals

For the Ninth Circuit

ROBERT DAVIS and O. A. DODSON,
Plaintiffs in Error.

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Plaintiffs
Brief of Defendant in Error

FILED

APR 26 1921

T. D. MONTGOMERY
CLERK

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No. 3640

United States
Circuit Court of Appeals

For the Ninth Circuit

ROBERT DAVIS and O. A. DODSON,
Plaintiffs in Error.

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Plaintiffs
Brief of Defendant in Error

The only error assigned on this appeal is that the Court erred in overruling defendants' motion in arrest of judgment. R. p. 30.

The motion in arrest of judgment raised the sole question of the sufficiency of the indictment to support the verdict. R. p. 25.

An insufficient indictment will not support a verdict of conviction, notwithstanding the provisions of Section 1025 R. S.

United States vs. Carll, 105 U. S. 612,

Dunbar vs. United States, 156 U. S. 192.

The charge in the indictment here is that the defendants "did knowingly, wilfully, corruptly, fraudulently and feloniously, conspire, combine, confederate, and agree together and with various and sundry other persons to the Grand Jurors unknown, to commit an offense against the United States, to-wit: the offense of knowingly, wilfully and unlawfully transporting, selling, bartering, furnishing and possessing intoxicating liquors, namely, whiskey, containing alcohol in excess of one-half of one per cent by volume, in violation of the Act of Congress, entitled, "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries," commonly known as the "National Prohibition Act of October 28, 1919." R. p. 6.

The provisions of the Act of October 28, 1919, (41 Stat. L. 305) relative to transportation of liquor are in Section 3, Title 2, as follows:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in

this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

“Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: Provided, that nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.”

Section 3 provides a lawful, as well as an unlawful, purpose for which liquor may be transported, and makes the negative of the lawful purpose the very heart of the definition of the unlawful purpose, to the end that the purpose of the section, and of the whole Act, as there declared, shall be accomplished.

The indictment does not charge that it was not intended to transport liquor “for nonbeverage purposes” “as authorized in this Act.”

The declaration in Section 3 that “all the provisions of this Act shall be liberally construed”

does not extend to Section 37 of the Penal Code of 1910 defining conspiracy. Conspiracy is a distinct and substantive offense.

United States vs. Stevenson (1909, 215 U. S. 200),

Thomas vs. United States (C. C. A. 8th Cir. 1907 156 Fed. 897).

Guilty intent is essential to violation of Section 37. It is necessary that the minds of the conspirators meet in agreement, express or implied, to do acts *for the purpose* made unlawful by Federal Law. It is immaterial that the conspirators may not know that the intended acts are in violation of the Federal Law.

United States vs. Newton (S. D. Ia. 1892) 52 Fed. 275.

United States vs. Lyman (D. C. Ore. 1911) 190 Fed. 414.

“If the purpose of the conspiracy be the doing of an act which is not an offense at common law, but only by statute, such purpose must be set forth in such a manner as to show that it is within the terms of the statute.” 12 Corp. Juris. 619, Par. 196;

United States vs. Sanger, 48 Fed. 78, (Appeal dismissed in 144 U. S. 310).

United States vs. De Grieff, 25 Fed. Cas. No. 14, 936.

“It will not be sufficient to allege in general terms, however strong, that the purpose

to be effected, was criminal or unlawful, nor that the means to be used, where their criminal character is relied on, were malicious or fraudulent or unlawful or criminal." 12 Corp. Juris, 623, Par. 200.

United States vs. Gardner, 42 Fed. 829.

The "means must be stated in such terms that the court may see they are unlawful at common law or by virtue of some statute." 12 Corp. Juris, 623.

"It is evident to any rational mind that under the decisions of the Supreme Court an indictment charging conspiracy must state an agreement to do acts with the intent *or for the purpose embraced within the intent specified in the statute creating the offense.* The existence of the intent cannot be left to inference."

United States vs. Green, 136 Fed. 659, (Affirmed 199 U. S. 601).

Pettibone vs. United States, 148 U. S. 196.

"It is an elementary rule of criminal law that where language does not constitute a crime, if uttered under some circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, in that the court can determine,

and not the pleader, whether or not they constitute the crime.”

Fontana vs. United States, 262 Fed. 283, 288 citing:

United States vs. Hess, 124 U. S. 483;

United States vs. Couikshank, et al, 92 U. S. 542;

United States vs. Carll, 105 U. S. 611;

Shilter vs. United States, 257 Fed. 724, 725.

“It is a rule of general application that if an exception or proviso appears in the enacting clause of a statute it must be shown in an indictment or information founded upon the statute, by means of language negating the exception, that the accused is not within the exception. Another, and perhaps more definite statement of the rule is that where a statute defining an offense contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, it must be shown that the accused is not within the exception.” 14 R. C. L. 188, Par. 34, citing: numerous cases under foot notes 11 and 12.

In Edward S. Dryer, plaintiff, in Err. vs. People of the State of Illinois, (188 Ill. 40),

58 L. R. A. on page 872, an exception is pointed out in a way that more clearly demonstrates the rule of general application. In that case the court said: "The only objection urged against the indictment under the motion to quash was that it failed to negative the last proviso, namely, that it did not allege that the failure or refusal to pay over the money was not occasioned by unavoidable loss or accident. The rule as stated by this court is that "where an act is made criminal, with exceptions embraced in the same clause of the statute which creates the offense, so as to be descriptive of the offense intended to be punished, it is necessary in the indictment stating the act had been done, to negative the exceptions, so as to show affirmatively the precise crime defined has been committed;" also that "there are exceptions to this general rule, as where the exception or proviso be in a subsequent clause of the statute, or if in the same section, and not incorporated with the enacting clause by any apt words of reference, it is, in that case, a matter of defense, and need not be negatived in the pleading." *Beasly vs. People*, 89 Ill. 571.

"Counsel do not disagree as to this being a correct statement of the law as laid down by the uniform current of authority, but it is

insisted on behalf of plaintiff in error that the foregoing proviso is embraced in the same clause of the statute which creates the offense, is descriptive of the crime intended to be punished, and is incorporated with the enacting clause, and therefore the indictment should have charged that the failure or refusal was not occasioned by unavoidable loss or accident. The plain language of the statute, in our opinion, refutes this position. The definition of the offense intended to be punished, and the penalty denounced against it, are clearly stated in a complete sentence, wholly independent of either of the succeeding provisos. Although they are in the same section, they are not "incorporated with the enacting clause by any apt words of reference." The language, "if it appears," etc., clearly indicates an intention to allow an officer the benefit of such a defense, and not to require the state to allege and prove the negative. The construction insisted upon would practically destroy the efficacy of the law. It would be easy enough to make the allegation, but in many, if not more, cases, it would be impossible to make the negative proof. The motion to quash the indictment was properly overruled."

In *State vs. Abbey* (29 Vermont 60) 67 Am. Dec. 754, the Court said:

“The case of Commonwealth vs. Hart, I Lead. Crim. Case, 250 is a forcible illustration of the rule where exceptions in a statute should be, and where they are not required to be negatived. The act of 1852 in Massachusetts provided that ‘no person shall be allowed to be a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof, without being duly authorized, on pain of forfeiting,’ etc. “Provided, that nothing in the act shall be construed to prevent the manufacture or sale of cider for other purposes than that of a beverage, or the sale and use of the fruit of the vine for the commemoration of the Lord’s Supper.’ The words ‘without being duly authorized’ defined and qualified the act forbidden by the statute. It was not all sales or manufacture of intoxicating liquor which were forbidden, but only such as were unauthorized; hence the want of authority should be averred and proved, though it might involve the proof of a negative. But the matter embraced in the proviso did not define, qualify, nor was it descriptive of the matter prohibited in the enacting clause. When it was alleged in the indictment, and proved on trial, that the respondent was a common seller of spirituous and intoxicating liquors without being duly authorized, the

offense was fully made out; a prima facie case was alleged and proved, and it was for the defendant to prove that he was within any of the cases mentioned in the proviso."

The offense defined in Section 3 of the National Prohibition Act is apparently not difficult to charge or prove so far as the exception therein incorporated is involved.

In the Fontana case, 262 Federal 283, hereinbefore cited and quoted from, Judge Sanborn, on page 286, said: "The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading." Citing: *Miller vs. United States*, 133 Fed. 337, 341, 66 C. C. A. 399, 403; *Naftzger*,

vs. United States, 200 Fed. 494, 502, C. C. A. 598, 604.

“It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction.” Citing: United States vs. Britton, 107 U. S. 665, 669, 670, 2 S. U. P. Ct. 512, 27 L. E. D. 520; U. S. vs. Hess, 124 U. S. 483, 488, 8 S. U. P. Ct. 571, 31 L. E. D. 516; Miller vs. U. S., 133 Fed. 337, 341, 66 C. C. A. 399, 403; Armour Pkg. Co. vs. U. S. 153 Fed. 1, 16, 17, 82 C. C. A. 135, 150, 151, 14 L. R. A. (N. S.) 400; Etheredge vs. U. S., 186 Fed. 434, 108 C. C. A. 356; Winters vs. U. S., 182 Fed. 721, 722, 105 C. C. A. 163, 167.

Respectfully submitted,

ALBERT SCHOONOVER,
Attorney for Plaintiffs in Error.

1864

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Robert Davis and O. A. Dodson,
Plaintiffs in Error,

vs.

United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

ROBERT O'CONNOR,
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IN THE
United States
Circuit Court of Appeals,
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Robert Davis and O. A. Dodson, <i>Plaintiffs in Error,</i> <i>vs.</i> United States of America, <i>Defendant in Error.</i>	}
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BRIEF OF DEFENDANT IN ERROR.

Plaintiffs in error on this appeal attack the order of Court denying their motion in arrest of judgment, wherein the sufficiency of the indictment to support the verdict of the jury is assailed. The said indictment is set forth in transcript page 6.

The sole question for the consideration of the court is, does the indictment state a public offense under the existing laws of the United States? We think it does. Section 37 of the Federal Penal Code, under which the same is drawn, reads as follows:

“Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.”

The true test of the sufficiency of an indictment is not whether it might probably have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Cochran v. United States, 157 U. S. 286;

Daniels v. United States, 196 Fed. 459;

Armour Packing Co. v. United States, 209 U. S. 83;

Jones v. United States, 179 Fed. 584;

Bettman v. United States, 224 Fed. 819, 826.

Furthermore, defects in an indictment must be such as will prejudice the accused in order to render the indictment bad.

Jones v. United States, 162 Fed. 417.

It is not necessary to be so particular in the allegations of an indictment as to entrap the Government into allegations it cannot prove. The essential elements of an offense set out is all that is required.

Evans v. United States, 153 U. S. 584;

Nayes v. United States, 179 Fed. 613.

In N. Y. C. R. R. Co. v. U. S., 212 U. S. at page 497, the court said:

“Objections were made to the sufficiency of the indictment based upon its want of particularity in describing the offense intended to be charged. Sec. 1025 of the Revised Statutes of the United States provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant, and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed there can be no reversal.

Connors v. U. S., 158 U. S. 408;

Armour Packing Co. v. U. S., 209 U. S. 56.

An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense.”

In Potter v. U. S., 155 U. S. 442, an indictment charging unlawful certification of a check was held

sufficient although it did not allege delivery, the court holding that,

“It would be giving an unnecessary strictness to the language of the indictment to adjudge it insufficient or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him always to use a judgment upon it as a bar to any other prosecution; and that, as we all know, is the substantial purpose of a written charge.”

In the case of *Smith v. United States*, reported in 157 Fed. 721, the indictment charged the defendant with conspiring to injure * * * John Reed in the free exercise and enjoyment of freedom from involuntary servitude and slavery. The Indictment was attacked for insufficiency. On page 726, the court says:

“It is said that the failure to aver that John Reed was not to be subjected to involuntary servitude as a punishment for a crime, is fatal to the indictment. This is untenable. The ingredients of the offense were susceptible of accurate and clear description without regard to the exception; and they were so described. * * * The exception in question is defensive in its character, and if the defendants fell within its protection, it was an easy matter for them to show it, and it was their duty to do so.”

This case was affirmed by the Supreme Court, 208 U. S. 618.

United States v. Cook, 17 Wall. 168;

Ledbetter v. United States, 170 U. S. 606;

Shelp v. United States, 81 Fed. 694;

United States v. Simpson (D. C.), 257 Fed. 869;

Breitmayer v. United States, 249 Fed. 929;

United States v. Oregon Short Line, 169 Fed. 528;

Joplin Mercantile Co. v. United States, 213 Fed. 926, 933;

(Affirmed 236 U. S. 531.)

Rothman *et al.* v. United States, 270 Fed. 31.

“Further, no demurrer was filed or motion to quash made or objection to the indictment effectively taken, until by motion in arrest after verdict. In such case, nothing less than substantial failure in substance in the indictment can avail defendant. Formal or artificial insufficiencies are waived. Dunbar v. U. S., 156 U. S. 185, 191, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; Rosen v. U. S., 161 U. S. 29, 34, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Tyomies Pub. Co. v. U. S. (C. C. A. 6), 211 Fed. 385, 389, 128 C. C. A. 47.”

Ulmer v. United States, 219 Fed. 643.

As no challenge was made of the indictment prior to the trial, and the question was only raised by motion in arrest of judgment, and as, further, that which was intended was obvious, it is fair to rule that any

merely technical defect in this indictment was cured by the verdict.

Westmoreland v. United States, 155 U. S. 546;
Dunbar v. United States, 156 U. S. 185.

“We have heretofore expressed our disapproval of the practice of postponing a challenge to the sufficiency of the indictment until after an expensive trial has been had. * * * A better practice is to raise such question by demurrer in advance of trial.”

Clemons v. United States, 149 Fed. 305, 315;
Morris v. United States, 168 Fed. 683;
Ackley v. United States, 200 Fed. 223.

In construing section 37 of the Federal Penal Code, in the case of Aczel v. United States, reported in 232 Fed. 652, the court says:

“Under the adjudicated cases, it seems well settled that in an indictment for conspiracy to do an unlawful act, the unlawful act which is the object of the conspiracy is not required to be set forth in such particularity as in the case of a prosecution for commission of the substantive offense.”

Again, in Williamson v. United States, reported in 207 U. S. 425, the indictment charged a conspiracy to commit subordination of perjury to the objection that the indictment did not set out with technical precision the elements essential to the commission of the crime of subordination of perjury, the court said, at page 447:

“But in a charge of conspiracy, the conspiracy is the gist of the crime, and certainly to a common intent, * * * sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy.”

In *Ching v. United States*, reported in 118 Fed. 538, the court referred to an indictment for conspiracy to commit an offense, and said:

“In such cases, the offense which is intended to be committed as the result of the conspiracy, need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime.”

United States v. Cahill, reported in 9 Fed. 80, involves an indictment for unlawfully preventing a qualified voter from exercising the right to vote. The person whose vote was refused is described as a “qualified voter.” No specific qualifications were enumerated. The court said:

“While it may be conceded that where a person offering to vote sues an officer of election for refusing his vote, or where he is the party plaintiff whose right of action is dependent upon his legal qualifications, he should set out the facts on which his qualifications rests, yet that rule does not apply where, as in this case, the defendant is not the voter, but the defendant in a criminal proceeding against him for unlawfully interfering with the voter. It will devolve upon the United States at the trial to show affirmatively that Batton

was a legally qualified voter; * * * but the detailed facts on which his qualification depends need not be averred in the indictment.”

The law relative to the substantive offense against the United States, which the indictment alleges plaintiffs in error conspired to commit, is the National Prohibition Act. Section 3 of said act, provides as follows:

“Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

“Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor; provided; that nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.”

Section 6 of the said National Prohibition Act reads as follows:

“Sec. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do * * * .”

Section 32 of the said National Prohibition Act reads as follows:

“Sec. 32. * * * It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, * * *”

It will be observed that in an indictment for a direct violation of said act, it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, and need not include any defensive negative averments, but shall be sufficient to state that the act complained of was then and there prohibited and unlawful.

The main question now before this court in this appeal was heretofore decided in this Circuit on May 17, 1920, in case No. 3388, *Hockett et al. v. United States*, 265 Fed. 588.

“The judgment should not be reversed on account of a criticism so obviously technical and unsubstantial.”

Grant v. United States, 268 Fed. 443, 445;

Grandi v. United States, 262 Fed. 123;

U. S. Comp. Stat. (1916), Sec. 1691;
Judicial Code, Sec. 269, as amended February
26, 1919 (40 Stat. 1181, c. 48);
West v. United States (C. C. A. 6), 258 Fed.
413, 415, 169 C. C. A. 429;
Grandi v. United States (C. C. A. 6), 262 Fed.
123, 124.

Respectfully submitted for the consideration of the
court,

ROBERT O'CONNOR,
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Attorneys for Defendant in Error.

No. 3641

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA HOMESTAKE MINING COMPANY, a
Corporation,

Appellant,

vs.

R. A. W. KRAMPITZ,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Third Division.

FILED
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No. 3641

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Names and Addresses of Attorneys of Record.

E. E. RITCHIE, Esq., Attorney for Plaintiff,
Valdez, Alaska.

J. L. REED, Esq., Attorney for Defendant,
Valdez, Alaska.

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Complaint.

Plaintiff alleges:

1.

That it is a corporation duly organized under the laws of the State of Washington and owning prop-

erty in the territory of Alaska. It has filed its articles of incorporation, appointment and consent of agent, and annual financial statement in the office of the Secretary of the Territory and in the office of the clerk of the District Court, Third Division, at Valdez, and has paid its annual license fee for the year 1920 to the territory.

2.

Plaintiff is now and has been continuously for several years last past the owner and, subject to the rights of certain lessees hereinafter mentioned, entitled to the possession of two certain quartz mining claims situate adjacent to the north shore of Harri-man fjord, Prince William Sound, Valdez precinct, Territory of Alaska, known as Camp Bird No. 1 and Camp Bird No. 2. It is also the owner of all improvements, machinery, tools and other mining supplies and equipment on said claims, or which were on said claims on April 17, 1920, and was then and is now entitled to the immediate possession of all of the same. It is also the owner of 12½ per cent of the value of certain gold amalgam extracted from said premises by defendant and other persons in privity with him, as hereinafter more fully set forth.

3.

On or about May 1, 1918, at Seattle, Washington, plaintiff entered into a contract in writing with J. E. Whalen and William [1*] Quitsch whereby it leased to them said mining claims, together with all improvements, equipment and tools thereon, for a term of five years, ending October 25, 1922. At the

*Page-number appearing at foot of page of original certified Transcript of Record.

time said lease was made said lessees were in possession of all of said property and thereafter continued in possession for a short time, when they assigned the lease and all rights thereunder to a corporation known as the Free Gold Mining Company. Said corporation entered into possession of all said property and continued in possession of the same until about January 1, 1920, when it abandoned said property, and said lease became and was declared forfeited according to its terms, as hereinafter set forth. Said lease was filed for record in the office of the recorder of Valdez precinct May 31, 1918, and thereafter was duly recorded in Book 27, beginning at page 352. A copy thereof is annexed hereto, marked Exhibit "A," and made a part of this complaint.

4.

Said lease provided that 12½ per cent of the gross output of gold and other metals taken by the lessees from the ground should be paid to the lessor upon receipt of returns of such metals from the United States assay office at Seattle, Washington.

5.

Said lease further provided that after July 1, 1918, the lessees should keep at least six men steadily at work upon said mining claims, unless prevented by acts of God, labor strikes or other things over which they had no control, and that cessation of work upon the mine for a period of thirty days should work a forfeiture of the lease, and in such case the property should immediately revert to the lessors. It was further stipulated in said lease that the lessees should

at all times keep the premises free and clear of liens for labor or material furnished to the lessees.

6.

It was stipulated in said lease that all improvements, machinery, tools and other equipment placed on the property by the [2] lessees during the term of the lease should remain upon the premises and become the property of the lessors at the expiration of the lease either by running of the term or by forfeiture as stipulated in its provisions.

7.

In June, 1919, while said Free Gold Mining Company was in possession of said mine and equipment as assignees of said lessees named in said lease and engaged in developing and operating said mine, plaintiff caused to be posted in three conspicuous places on the ground a notice in writing as provided in Chapter 13 of the Session Laws of the Alaska legislature of 1915, stating that it was the owner of the mine and that the mine was being operated by lessees whose lease was of record in Book 27 at page 352, in the office of the recorder of Valdez precinct, and that said owner would not be responsible for the wages of labor employed by the lessees or their assignee, Free Gold Mining Company. A copy of said notice is annexed hereto, marked Exhibit "B," and made a part of this complaint.

8.

About January 1, 1920, or shortly prior thereto, said lessees and their assignee, Free Gold Mining Company, abandoned said property and have not since been in possession of any part of it, and after

the expiration of thirty days next following said abandonment said lease and all rights thereunder became forfeited because of the failure of the leaseholders for more than thirty days to keep at least six men at work upon the mine, or any men at all, and because of their failure to keep the premises free and clear of labor liens. Said failure to keep men at work was not due to any act of God, labor strike, or other unavoidable circumstance, but was wholly the fault of the lessees and their assignee. Through said forfeiture said mine and all improvements, machinery, tools and other equipment thereon, whether placed there by plaintiff or by the lessees or their assignee, reverted to the ownership and right of possession of plaintiff. [3]

9.

In January, 1920, the defendant and five other persons filed in the office of the recorder of Valdez precinct aforesaid claims of lien upon certain machinery, tools and other equipment on said premises, belonging to plaintiff, and upon certain gold amalgam taken from said mine, all more fully described hereinafter. All of said claims of lien were for wages of labor expressly stated to have been performed wholly subsequent to the posting of the notice by plaintiff of nonliability for labor employed by the lessees or their assignee as set forth in paragraph 7 of this complaint.

10.

Thereafter, defendant for himself and as assignee of the other five claimants filed suit in this court to foreclose said purported liens upon the property de-

scribed in them, and in his complaint made only the Free Gold Mining Company defendant, alleging employment by it alone of each of the lien claimants, while alleging further that said Free Gold Mining Company's interest in the mining property described was by virtue of the lease recorded in Book 27 at page 352 of the records of Valdez precinct. This plaintiff was not made a party to the suit, and was not mentioned in the complaint.

11.

Thereafter such proceedings were had in said action that judgment was rendered therein April 17, 1920, against said Free Gold Mining Company and in favor of the plaintiff, defendant herein, for \$1,900.10 and \$383.30 costs, and foreclosure of said liens, and directing sale of the property described by the United States marshal. Thereafter, acting under an order of sale issued out of the clerk's office of this court, the United States marshal of the Third Division of Alaska purported to sell, on May 1 and May 15, 1920, certain parts of said mine and certian articles of personal property belonging to it, fully described in said marshal's return of said sales, filed in said cause, which return is in words and figures as follows, to wit: [4]

United States of America,
Territory of Alaska,
Third Division,—ss.

MARSHAL'S RETURN.

I hereby certify and return that I received the annexed Order of Sale on the 19th day of April, 1920, and thereafter on the 19th day of April, 1920, I did

advertise according to law by posting Notices of Sale in three conspicuous places within five miles of the place of sale, one being at the door of the Postoffice, Valdez, Alaska; that I would on the 1st day of May, 1920, at 2 o'clock in the afternoon, at the front door of the Courthouse, Valdez, Alaska, offer for sale at public vendue to the highest and best bidder, for cash, the following described personal property of defendant, Free Gold Mining Company, a corporation:

66 oz. 6 pwt. of GOLD REPORT,

and thereafter on the 1st day of May, 1920, at 2 o'clock in the afternoon, at the front door of the Courthouse, Valdez, Alaska, I did offer for sale said personal property and sold same to R. A. W. Krampitz, Plaintiff herein, for the sum of (\$331.50) Three Hundred thirty-one and 50/100 that being the highest and best bid received.

And thereafter on May 15, 1920, by virtue of said Order of Sale issued on the said 19th day of April, 1920, I did advertise according to law by posting notices of Sale, in three conspicuous places, two within five miles of the place of sale, and one on the Postoffice at Granite, Alaska, that I would on the 1st day of June, 1920, at 2 o'clock in the afternoon, at defendant company's mining property, at mining claims known as Camp Bird No. 1, and Camp Bird No. 2, situated Harriman Fjord, an inlet of Prince William Sound in Valdez precinct, Territory of Alaska, offer for sale at public vendue to the highest and best bidder, for cash, the following described personal property of said defendant company:

One seven foot Lane Mill; one 25 h. p. Foos engine; steel rails, cars, pipes, forge, beltings, pulleys, tools, hose, one ten by ten Ingersoll Air Compressor; one Receiver; one 25 h. p. Fairbanks Morse gas engine and equipment; one seven by eight inch Dodge Crusher; three stopers; three jack hammers; one six h. p. Fairbanks hoist engine and cable; one two h. p. Fairbanks Morse engine; one Gibson Mill and equipment including concentrators and three amalgam plates:

And thereafter on the 1st day of June, 1920, at 2 o'clock in the afternoon, at the mill of the Free Gold Mining Company on Harriman Fjord, Alaska, I did offer for sale said personal property in separate parcels, but no bids being received, I did then offer it for sale as a whole and sold the same to R. A. W. Krampitz, plaintiff herein, for the sum of Five Hundred and no/100 (\$100.00), that being highest and best bid received.

The plaintiff herein has paid the Marshal's costs on this Writ amount to \$126.13.

Returned this 2nd day of June, 1920.

F. R. BRENNEMAN,

U. S. Marshal,

By John A. Roseen,

Deputy.

12.

Said defendant has converted to his own use all of said gold amalgam, including the 12½ per cent thereof belonging to plaintiff as royalty as hereinbefore set forth. He has removed from the mine [5]

and premises part of the personal property described in said marshal's return of sale, and threatens to remove the remainder and convert all of the same to his own use.

Wherefore plaintiff prays for a judgment of this Court decreeing said sales to be void as against the rights of plaintiff, and setting aside and vacating said judgment of R. A. W. Krampitz against the Free Gold Mining Company so far as the same adjudges any part of the property described in the marshal's return of sale except $87\frac{1}{2}$ per cent of the gold amalgam to be the property of the Free Gold Mining Company and subject to the liens described therein at the time the same were filed or at any other time. And plaintiff prays that the Court adjudge and decree that it is the owner and entitled to the immediate possession of $12\frac{1}{2}$ per cent of said gold amalgam and of all the other personal property and mining equipment described in said marshal's return of sale, and that defendant herein has no right, title or interest in or lien upon said personal property or mining equipment or the $12\frac{1}{2}$ per cent of said gold amalgam claimed by plaintiff, and that defendant be restrained from interfering with plaintiff's said possession and that he return to plaintiff all of said property he has removed or converted to his own use, or that plaintiff have judgment for its value, and that plaintiff have judgment for its costs herein.

LYONS & RITCHIE,

Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

E. E. Ritchie, being duly sworn, says he is attorney for the plaintiff corporation; that said corporation has no officer in the Territory of Alaska, and affiant makes this verification for that reason; that he has read the foregoing complaint and he believes the same to be true.

E. E. RITCHIE.

Subscribed and sworn to before me this 19th day of October, 1920.

[Notarial Seal]

I. HAMBURGER.

Notary Public.

My Commission expires Oct. 31/1921.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 19, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [6]

Exhibit "A."

No. 18529.

THIS INDENTURE made this first day of May, 1918, by the ALASKA HOMESTAKE MINING COMPANY, a corporation organized under the laws of the State of Washington, party of the first part, and J. E. WHALEN and WILLIAM QUITSCH, of the Town of Valdez, Territory of Alaska, parties of the second part, WITNESSETH:

WHEREAS, the party of the first part on the 20th day of October, 1917, leased, demised and let unto the parties of the second part all of those cer-

tain mining claims situate near the north shore of Harriman Fjord, an inlet in Prince William Sound, in the Valdez Recording Precinct, Territory of Alaska, and further described as follows, to wit:

Those two certain lode mining claims known as and called CAMP BIRD NO. 1 and CAMP BIRD NO. 2, the notices of location of which are of record in Book 22 at pp. 266 and 267 of the records of the Recording Precinct of Valdez, Alaska, together with all improvements, machinery, tools, buildings and equipment upon or near said mining claims and used or to be used in connection with the working or development of the same, together with all and singular the tenements, hereditaments, appurtenances, rights and privileges thereunto belonging or in anywise appertaining, including a certain quantity of tools and equipment at that time in the Town of Valdez, Alaska, the property of the party of the first part, the same to be taken to said mining claims by the parties of the second part. The records of said recording office in the book and at the pages above named are hereby made a part of this agreement, for a further and more definite description of said mining claims, and:

WHEREAS, all of the parties hereto desire now to modify and change the terms and conditions of said lease, without impairing the original thereof, which was executed on the 20th day of October, 1917, as aforesaid, except as to such conditions, terms and agreements as are described and recited herein, NOW, THEREFORE,

IT IS AGREED by and between the parties hereto

that for and in consideration of the sum of One Dollar, paid by the parties of the second part to the party of the first part, the terms of said original lease is hereby extended for a period of five (5) years from and after the 25th day of October, 1917, unless sooner terminated thru a violation of any covenant or agreement contained in this lease, and said original lease, and to expire on the 25th day of October, 1922. A copy of said original lease is attached hereto and made a part of this agreement.

It is further agreed by and between the parties hereto that the parties of the second part shall pay to the party of the first part for the use and possession of said mining claims twelve and one-half per cent ($12\frac{1}{2}\%$) of the gross output of all gold or other metals taken or extracted from the ore or ore bodies of the said mining claims, for all of the time which this lease has to run; and all gold or other metals taken, extracted or returned from said ore shall be deposited by the parties of the second part in the First Bank of Valdez, at Valdez, Alaska, for said first party and said bank shall immediately forward the same to the United States Assay Office at Seattle, Washington, and upon receiving returns therefrom it is agreed that said bank may immediately credit $12\frac{1}{2}\%$ of such returns from said gold or other metals to the credit of the party of the first part, and $87\frac{1}{2}\%$ of such returns shall be credited to the parties of the second part.

It is further agreed that all improvements, machinery, tools and other equipment placed on said property by the parties of the second part during

any of the time which this lease has to run shall, at the expiration of the term of the same, be the property of the party of the first party and shall not be removed from said property by the parties of the second part, and in case said lease expires prior to the 25th day [7] of October, 1922, by virtue of a violation of any of the terms of the same by the parties of the second part, in such case all of said improvements, machinery, tools and other equipment placed on said property by the parties of the second part shall be the property of the party of the first part.

It is further agreed and the parties of the second part hereby agree to have a compressor on said mining claims on or before the 1st day of July, 1918, and that a mill capable of handling not less than ten tons of ore per day shall be placed on said mining claims on or before the 1st day of September, 1918.

It is further agreed by and between the parties hereto that the lease which was executed on the 20th day of October, 1917, by the parties of the second part and the party of the first part herein, together with this agreement, shall constitute and be one and the same instrument except as modified by this agreement.

It is further agreed that each and every condition, agreement and covenant contained herein shall bind the heirs, executors, administrators and assigns of each and all of the parties hereto.

IN WITNESS WHEREOF the said party of the first part has caused these presents to be executed by its president and attested by its secretary pursuant to a resolution of its Board of Directors and

its corporate seal to be hereto attached, and the parties of the second part have hereunto set their hands, the day and year in this agreement first above written.

ALASKA HOMESTAKE MINING COMPANY,

By EDWIN ECKERN,
Its President,
Party of the First Part.

[Corporate Seal] Attest: L. L. BAIR,
Secretary.

WM. QUITSCH,
J. E. WHALEN,
By J. E. WHALEN,
His Attorney in Fact,
Parties of the Second Part.

Executed in the presence of:

JOHN LYONS.

State of Washington,
County of King,—ss.

THIS IS TO CERTIFY that on this 1st day of May, 1918, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared J. E. Whalen, who is to me known to be one of the parties described in and whose name is subscribed to the foregoing agreement, and he acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned; and at the same time personally appeared before me J. E. Whalen, who is known to me to be the same person whose name is subscribed to the foregoing agreement

as attorney in fact of William Quitsch, and the said J. E. Whalen acknowledged to me that he subscribed the name of William Quitsch thereto as principal and his own name as attorney in fact, freely and voluntarily, for the uses and purposes therein mentioned; and at the same time personally appeared before me Edwin Eckern as the President of the Alaska Homestake Mining Company, the party of the first part to said agreement, and he acknowledged to me that he executed the same as the free and voluntary act and deed of said corporation, and declared to me that he was duly authorized to execute the same by virtue of a resolution of the Board of Directors of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my Notarial Seal the day and year first in this certificate written.

[Notarial Seal] THOMAS R. LYONS,
Notary Public in and for the State of Washington,
Residing at Seattle.

My Commission expires Sept. 22, 1918. [8]

LEASE.

THIS INDENTURE, made this 20th day of October, 1917, between ALASKA HOMESTAKE MINING CO., a corporation organized under the laws of the State of Washington, the party of the first part, and J. E. WHALEN and WM. QUITSCH, both residents of Valdez, Alaska, the parties of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the royalties hereinafter reserved, and the covenants and agreements hereinafter ex-

pressed, which are by the parties of the second part to be kept and performed, has granted, demised and let and by these presents does grant, demise and let unto the said parties of the second part, all of the following described mine and mining property situated near the north shore of Harriman Fjord, an inlet in Prince William Sound, in the Valdez Recording Precinct, Territory of Alaska, to wit:

Those two certain lode mining claims known as and called Camp Bird No. 1 and Camp Bird No. 2, the notices of location of which are of record in Book 22, at pages 266 and 267 of the records of the office of the United States Commissioner and Ex-Officio Recorder in and for the said Valdez Recording Precinct at Valdez, Alaska; together with all improvements, machinery, tools, buildings and equipment upon or near said mining claims and used or to be used in connection with the working or development of the same and together with all and singular the tenements, hereditaments, appurtenances, rights and privileges thereunto belonging or in anywise appertaining; and together with a certain quantity of tools and equipment now in the town of Valdez, Alaska, the property of the party of the first part, the same to be taken to said mining claims and mine by the parties of the second part.

To have and to hold the said premises and property and all thereof unto the said parties of the second part for the term of two years from and after the 25th day of October, 1917, unless sooner forfeited or terminated thru the violation of any covenant

thereinafter against the said parties of the second part reserved.

And in consideration of such demise it is covenanted and agreed by and between the said parties herein as follows, to wit:

FIRST, the parties of the second part agree immediately to enter upon and into the possession of said mining claims and premises and property and to work and mine the same at all times in a good and minerlike manner. The parties of the second part agree that between the 25th day of October, 1917, and the 1st day of July, 1918, they shall keep at least two men steadily at work upon said mining claims either themselves or other persons whom they may employ, unless prevented by acts of God or other things over which they have no control, and after the 1st day of July, 1918, until the date of the expiration of this lease the parties of the second part covenant and agree that they will keep at least six men steadily at work upon said mining claims including themselves, unless prevented by Acts of God, labor strikes or other things over which they have no control. It is mutually understood and agreed that cessation of work by the parties of the second part upon said *mind* for a period of thirty days shall work a forfeiture of this lease and the mining premises or mine described herein shall immediately revert to the party of the first part.

SECOND: It is agreed that the duly authorized officers or agents of the party of the first part shall have the privilege at all times of entering upon said mining claims and into all the workings thereon for

the purposes of inspection and in order to determine the manner and kind of work done and the amount of ore extracted from said mine.

THIRD: The parties of the second part further agree that they will keep a record of all ore taken or extracted from said mining claims and milled or otherwise reduced in any manner and they shall also keep a record of the proceeds obtained from such ore.

FOURTH: The parties of the second part further agree that they shall pay as royalties for the use and possession of said premises twenty-five percent (25%) of the gross amount of gold recovered from the ore extracted from said premises. All gold extracted from the ore taken from said premises shall be deposited by the parties of the second part in The First Bank of Valdez, at Valdez, Alaska, and said bank shall immediately forward the same to the United States Assay Office, and upon receiving [9] returns from each shipment the said bank shall immediately credit seventy-five percentum (75%) of such returns to the parties of the second part and twenty-five percentum (25%) thereof to the party of the first part.

FIFTH: The party of the first part is now indebted to the parties of the second part in the total sum of \$629.00, of which sum \$315.00 is due to the said J. E. Whalen and the sum of \$314.00 is due to the said Wm. Quitsch. It is mutually understood and agreed that the first royalty due to the party of the first part hereunder shall be applied upon the debt so due from the party of the first part to the parties of the second part, and shall be credited to the

account of the parties of the second part at the said bank until said debt is fully paid unless the same be paid in some other manner.

SIXTH: The parties of the second part further agree to keep the said mine, and all and every part and portion thereof, free and clear of and from all liens arising from labor performed for or material furnished to the parties of the second part in any manner connected with said mining claims.

SEVENTH: The parties of the second part agree that at the expiration of this lease, or sooner if forfeited or terminated, by reason of their failure to comply with the covenants hereof, that they will deliver said premises, and all and every portion thereof to the party of the first part in good order and condition.

EIGHTH: Each and every clause and covenant of this indenture shall inure to the benefit of, descend to and become binding upon the heirs, administrators successors and assigns of all parties hereto.

IN WITNESS WHEREOF the said party of the first part has caused these presents to be executed by its President and attested by its Secretary, pursuant to a valid resolution of its Board of Directors and its corporate seal to be hereto attached, and the parties of the second part have hereunto set their hands

and seals on the day and year hereinabove first written.

ALASKA HOMESTAKE MINING CO.,

By EDWIN ECKERN,

President.

[Seal]

Attest: S. A. PEPPER,

Secretary.

J. E. WHALEN,

WM. QUITSCH,

Parties of the Second Part.

Done in the presence of:

ANTHONY DIMOND.

F. J. HAYES.

United States of America,

Territory of Alaska,—ss.

THIS IS TO CERTIFY that on this 20th day of October, 1917, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Wm. Quitsch and J. E. Whalen, to me personally known and to me known to be the identical individuals described and named as the parties of the second part in the foregoing instrument, and they duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; also appeared Edwin Eckern, the President of the Alaska Homestake Mining Co., the party of the first part to said instrument, and he acknowledged to me that he executed the same as the act and deed of the said Alaska Homestake Mining Co., duly authorized thereunto by a valid resolution of its Board of Directors.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

ANTHONY J. DIMOND,

Notary Public for Alaska.

My Commission expires Feb. 13, 1921.

EXPLANATION AND PART OF ANNEXED
LEASE.

The words "Said Premises" as used in the Seventh (7th) paragraph of the annexed lease is understood and agreed to cover any buildings improvements machinery or tools whether described in the description contained in said lease or placed thereon by the parties of the second part during the term of said lease. And this explanation is to be signed by all of the parties to said lease, and is to be considered and is hereby [10] agreed that the same is to form a part of said lease.

ALASKA HOMESTAKE MINING CO.,

By EDWIN ECKERN,

President. (Seal)

_____ ,

_____ ,

Parties of the Second Part.

S. A. PEPPER,

Witness.

_____,

Witness.

MINUTES OF THE MEETING OF THE BOARD
OF DIRECTORS OF THE ALASKA HOME-
STAKE MINING COMPANY.

At a special meeting of the Board of Directors of

the Alaska Homestake Mining Co., held at its offices in the City of Seattle, State of Washington, on the first day of May, 1918, the following proceedings were had, to wit:

There were present at said meeting the following named directors: Edwin Eckern, Edmund Smith, L. L. Bair and Samuel Pepper, constituting a majority of the Board of Directors of said Company.

Mr. Edwin Eckern acted as Chairman of said meeting and Mr. L. L. Bair acted as its Secretary.

The Chairman stated that said meeting was called for the purpose of considering a modification of terms of a certain lease which was granted by said Company to J. E. Whalen and William Quitsch on the 20th day of October, 1917, so that instead of paying 25% of the gross output of the mining claims described in said lease the parties of the second part therein should only pay 12½% of the gross output of said claims and that said lease should be modified so that the said parties of the second part therein should be required to place a compressor on said property on or before July 1st, 1918, and place a mill thereon on or before the 1st day of September, 1918, and that the time for which said lease was granted should be extended for a period of five years after the 20th day of October, 1917.

It was regularly moved and seconded that all of said modifications should be made as herein mentioned and upon vote being taken said resolution was unanimously adopted.

There being no further business, on motion said meeting adjourned.

Dated at Seattle, Washington, this 1st day of May, 1918.

EDWIN ECKERN,
President.

Attest: L. L. BAIR,
Secretary.

This is to certify that the foregoing is a true and correct copy of the minutes of the meeting of the Board of Directors of the Alaska Homestake Mining Company, held at its offices in the City of Seattle, Washington, on the 1st day of May, 1918.

L. L. BAIR,
Secretary.

WAIVER OF NOTICE AND CONSENT TO MEETING.

We, the undersigned, Directors of the Alaska Homestake Mining Company, a corporation organized and existing under the laws of the State of Washington, do hereby severally waive notice of the time, place and purpose of a special meeting of the Board of Directors of said company and consent that the same be held at Seattle, Washington of the 1st day of May, 1918, and we do further consent to the transaction of all business that may come before the meeting including the modification of that certain lease which was granted and executed on the 20th day of October, 1917, by the Alaska Homestake Mining Company to J. E. Whalen and William Quitsch, and we do hereby approve, ratify and confirm all of the terms contained in said lease as executed on the 20th day of October, 1917, and as modified on the 1st day of May, 1918.

Dated at Seattle, Washington, this 1st day of May, 1918.

EDWIN ECKERN,
S. A. PEPPER,
EDMUND SMITH,
Directors.

Filed for record in this office May 31, 1918, at 9 o'clock A. M.

GEO. J. LOVE,
U. S. Commissioner and Ex-officio Recorder. [11]
No. 18533.

ASSIGNMENT OF LEASE.

KNOW ALL MEN BY THESE PRESENTS, that J. E. Whalen and Wm. Quitsch, both of Valdez, Alaska, for a valuable consideration, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and set over unto FREE GOLD MINING COMPANY, a corporation organized and existing under the laws of the Territory of Alaska, its successors and assigns, all right, title, interest, claim and demand and right of possession to the property hereinafter described and in and to that certain lease dated the 20th day of October, 1917, between the Alaska Homestake Mining Company, a corporation, organized under the laws of the State of Washington, as party of the first part, and J. E. Whalen and Wm. Quitsch, parties of the second part, which leased certain mining property situated near the north shore of Harriman Fjord, an inlet of Prince William Sound in the Valdez Recording Precinct, Territory of Alaska, described as follows:

“Those two certain lode mining claims known as and called CAMP BIRD NO. 1 and CAMP BIRD NO. 2, the notices of location of which are of record in Book 22 at pages 266 and 267 of the records in the office of the United States Commissioner and Ex-officio Recorder in and for the said Valdez Recording Precinct, at Valdez, Alaska, together with all improvements, machinery, tools, buildings and equipment upon or near said mining claims and used or to be used in connection with the working or development of the same, and together with all and singular the tenements, hereditaments, appurtenances, rights and privileges thereunto belonging or in anywise appertaining; and together with a certain quantity of tools and equipment now in the Town of Valdez, Alaska, the property of the party of the first part, the same to be taken to said mining claims and mine by the parties of the second part.” Said lease being now of record in the records of the Valdez Recording Precinct in Book 27 of Records at Page 257 thereof; also that certain lease dated the 1st day of May, 1918, between Alaska Homestake Mining Company, a corporation, organized under the laws of the State of Washington and J. E. Whalen and Wm. Quitsch covering the same property heretofore described, which last named lease is a modification in some of the terms of the former lease herein described, the last named lease appearing of record in the records of the Valdez Recording Precinct, at Valdez, Alaska, in Book 27 of Records at Page 352 and reference is hereby made to this book and page herein named of the records of the Valdez Recording Precinct for a

more particular description and for the terms and conditions of each of said leases.

This assignment is intended to convey to FREE GOLD MINING COMPANY every and all rights and privileges now held by the said J. E. Whalen and Wm. Quitsch in and to said leases and the right of possession to the property herein described is intended to be transferred by this assignment subject however to all the terms and conditions contained in said two leases.

IN WITNESS WHEREOF, we have hereunto set out hands and seals this 3rd day of June, 1918.

J. E. WHALEN,

WM. QUITSCH,

By J. E. WHALEN,

His Attorney in Fact.

Done in the presence of:

ANTHONY J. DIMOND,

F. J. HAYES.

United States of America,

Territory of Alaska,

Third Division,—ss.

THIS IS TO CERTIFY that on this 3d day of June, 1918, before me, the undersigned, a Notary Public in and for the Territory of Alaska, personally appeared J. E. Whalen to me known to be one of the parties described in and whose name is subscribed to the foregoing instrument and he acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned and at the same time personally appeared before me J. E. Whalen who was known to me to be the same person

whose name is subscribed to the foregoing instrument as attorney in fact for Wm. Quitsch and the said J. E. Whalen acknowledged to me that he subscribed the name of Wm. Quitsch thereto as principal and his own name as attorney in fact, freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 3d day of June, 1918.

[Notarial Seal] ANTHONY J. DIMOND,
Notary Public for Alaska.

My Commissison expires Feb. 13, 1921. [12]

Filed for record in this office June 3, 1918, at 10:45 o'clock A. M.

GEO. J. LOVE,
U. S. Commissioner and Ex-officio Recorder.

Exhibit "B."

NOTICE OF NONLIABILITY FOR LABOR.

Notice is hereby given that the Alaska Homestake Mining Company is the owner of the mining claims known as the Camp Bird No. 1 and Camp Bird No. 2, near Harriman Fjord, Valdez Precinct, Territory of Alaska; that said claims were leased to J. E. Whalen and William Quitsch by lease which appears of record in the office of the commissioner and recorder of said Valdez precinct in Book 27 at pages 257-8-9-260, and supplemental lease to said lessees which appears of record in said recorder's office at pages 355-6-7-8-9-360 of Book 27; that said lease was assigned by said lessees to the Free Gold Mining Company, a corporation, by assignment which appears of record in said recorder's office in Book 27 at pages 364-5-6.

Notice is further given that all work being done on said mining claims or to aid in their development or operation is done under and by virtue of said lease by the lessees or their assigns, and said Alaska Homestake Mining Company will not be responsible for any wages of employes engaged in any kind of work upon said claims or in aid of mining operations thereon.

Dated and posted June —, 1919.

ALASKA HOMESTAKE MINING CO.

By E. E. RITCHIE. [13]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Demurrer.

Comes now the defendant R. A. W. Krampitz and demurs to plaintiff's complaint on file herein for the following reason, to wit:

That it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that said com-

plaint be dismissed and for his costs herein incurred.

J. L. REED,

Attorney for Defendant.

Service accepted this 15th day of November, 1920.

E. E. RITCHIE,

Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 16, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [14]

JOURNAL 13.

District Court, Territory of Alaska, Third Div.,
Valdez.

Page 50.

October 20th, 1920, Term of Court, Valdez, Alaska
—November 22d, 1920—24th Court Day—Monday.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
vs.

R. A. W. KRAMPITZ.

Minute Order Overruling Demurrer.

Now on this day the plaintiff being represented by its attorney, E. E. Ritchie, and the defendant being present by his attorney, J. L. Reed, Esq., this matter having on a prior day been heard upon the demurrer of the defendant to plaintiff's complaint—

IT IS ORDERED that the demurrer of the defendant to plaintiff's complaint herein be and the same is hereby overruled and the defendant given ten days from this date in which to answer. [15]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Answer.

Comes now the defendant R. A. W. Krampitz and for answer to plaintiff's complaint on file herein admits, denies and alleges:

I.

Referring to paragraph two thereof, defendant denies that plaintiff is the owner of all or any part of the machinery, tools, and other mining supplies and equipment on said claims or which was on said claims on April 17th, 1920, or that plaintiff was then or is now entitled to the immediate possession of all or any part of the same; defendant denies that plaintiff is the owner of 12½ per cent of the value of certain gold amalgam extracted from said

premises by defendant or other persons in privity with him.

II.

Referring to paragraph three thereof, defendant denies each and every allegation therein contained.

III.

Referring to paragraph eight thereof, defendant denies each and every allegation therein contained.

IV.

Referring to paragraph nine thereof, defendant denies that in January, 1920, the defendant and five other persons filed in the office of the recorder of Valdez precinct aforesaid, claims of liens upon certain machinery, tools and other equipment on said premises, belonging to plaintiff or upon any gold amalgam belonging to plaintiff.

V.

Referring to paragraph ten thereof, defendant denies that said suit filed for himself and as assignee of five other claimants to foreclose said liens upon the property described in them, that in [16] his complaint he alleges employment by the Free Gold Mining Company alone of each of the lien claimants.

VI.

Referring to paragraph eleven thereof, defendant denies that after April 17th, 1920, acting under an order of sale issued out of the clerk's office of this court, the United States marshal of the Third division of Alaska, purported to sell on May 1st and May 15th, 1920, certain parts of said mine and

certain articles of personal property belonging to plaintiff.

VII.

Referring to paragraph twelve thereof, defendant admits that he has appropriated all of said gold amalgam to his own use but denies that he has converted the same or any part thereof to his own use; defendant denies the 12½ per cent thereof belongs to plaintiff as royalty. Defendant admits that he has removed from the mine and premises part of the personal property described in said marshal's return of sale and admits that he expects to remove the remainder of *of* said personal property and to appropriate all of the same to his own use and to the use of other lien claimants in privity with him, but denies that he threatens to remove the remainder of said personal property or to convert all or any part of said personal property to his own use.

AFFIRMATIVE DEFENSES.

I.

For his first affirmative defense defendant alleges:

That on, prior to and subsequent to the 19th day of March, 1920, said 19th day of March, 1920, being the time plaintiff filed and commenced an action for himself and certain other lien claimants to foreclose their liens against the personal property described in the marshal's return of sale, plaintiff was a foreign corporation owning, leasing property and doing business within the Territory of [17] Alaska, ~~1913~~; that at said times and prior to the 4th day of

June, 1920, said plaintiff had wholly failed to comply with the provisions of Chapter 23 of the Compiled Laws of the Territory of Alaska, 1913, in the following particulars, that said plaintiff failed and neglected to file in the office of the Secretary of Alaska, and in the office of the clerk of the District Court for the 3rd Division a duly authenticated copy of their charter or articles of incorporation and also a statement verified by the oath of the president and secretary of said corporation and attested by the majority of the board of directors in accordance with the requirements of Section 654, and wholly failed and neglected during said times mentioned to file in said offices a certificate under the seal of the corporation, and *and* the signature of its president, vice-president, or other acting head and its secretary certifying that the corporation has consented to be sued in the courts of the district upon all causes of action arising against it in the district, and that service of process may be made upon some person, a resident of the district, with the name and place of residence designated in such certificate and that such service when so made upon such agent, shall be valid service on the plaintiff corporation; and did wholly fail and neglect to appoint an agent residing at the principal place of business of said plaintiff or at all; that said plaintiff has wholly failed and neglected at said times to file in like manner the written consent of any person to act as such agent for plaintiff.

II.

For his second affirmative defense defendant alleges:

1.

That the so-called notice of nonliability for labor alleged to have been posted and given by plaintiff in June, 1919, paragraph 7, sets forth the ownership by plaintiff of the mining claims known as [18] Camp Bird No. 1 and Camp Bird No. 2 near Harriman Fjord, Valdez precinct, Territory of Alaska, but that plaintiff failed and neglected at all times to post or give defendant notice of nonliability for defendant's labor and lien claims performed by defendant or defendant's assignors by virtue of any ownership, interest or claim by plaintiff in any part or portion of the personal property sold to defendant and described in marshal's return of sale set forth in paragraph eleven of plaintiff's complaint, according to law.

2.

That no part or portion of the property sold to plaintiff described in marshal's return of sale, was or is at the times mentioned real property or was or is at the times mentioned placed on the surface of the ground and affixed thereto, so as to become fixtures and included in the term "mine" as defined in Chapter 13 of the Session Laws of Alaska, 1915, or so as to become a part of the mining claims known as Camp Bird No. 1 and Camp Bird No. 2, the title or ownership thereof plaintiff seeks exemption from liability for labor performed thereon by

virtue of the alleged notice of nonliability set forth in paragraph seven of plaintiff's complaint.

3.

That all of the property sold and transferred to defendant by marshal's bills of sale and described in Marshal's return of sale, during all of the times mentioned when said lease or leases were made and entered into belonged to and the ownership thereof and thereto was in the Free Gold Mining Company, a corporation, save and except one two h. p. Fairbanks Morse engine; and one Gibson Mill and equipment; and upon none of said property was notice posted or claim of ownership given according to law by Alaska Homestake Mining Company.

4.

That said cause referred to in paragraph ten of plaintiff's [19] complaint was filed and commenced on the 19th day of March, 1920, by defendant and his assignors, five other lien claimants to foreclose their liens, for work and labor performed by them long prior to any so-called abandonment or forfeiture under said leases by Free Gold Mining Company. In Cause No. 1029, entitled *R. A. W. Krampitz vs. Free Gold Mining Company*, a corporation, in which all the property against which a lien is claimed is treated and described as personal property, and that the decree and judgment rendered and entered in said cause on the 17th day of April, 1920, in favor of the plaintiff in said cause and against the defendant, and the same being binding and conclusive against said defendant and others in privity with it required in part among

other things, "that immediately upon such sale taking place the marshal shall executed and issue to the purchaser or purchasers the proper bill of sale or bills of sale for said property, and thereupon said purchaser or purchasers shall be entitled to the sole and immediate and exclusive possession thereof." That in accordance with said decree and judgment all of said personal property was sold to this defendant and said marshal made, executed and delivered thereafter on the — day of May and June, 1920, bills of sale therefor to defendant transferring title and possession and right of possession to said property to defendant R. A. W. Krampitz. That said judgment and decree provided in part among other things, "That the said defendant and all persons claiming or to claim under it, and all person having liens subsequent to plaintiff's liens upon said mills, machines and machinery and said dump or mass of mineral bearing earth, ore, rock, and gold hereinafter described, and their and each of their heirs, assigns and personal representatives, and all persons claiming to have acquired any interest in said mine and property subsequent to the time plaintiff and his said assignors commenced to labor and render services whereby plaintiff's liens were acquired, be forever barred and foreclosed of and from all equity and claim of, in and to said property and every part and parcel thereof after the delivery of said marshal's bill of sale."

WHEREFORE defendant prays that said action

be dismissed with his costs and disbursements herein.

J. L. REED,
Attorney for Defendant. [20]

United States of America,
Territory of Alaska,—ss.

R. A. W. Krampitz, being duly sworn, deposes and says: That I am the defendant in the above-entitled cause, and have read the foregoing answer and know the contents thereof and that the same are true as I verily believe.

R. A. W. KRAMPITZ,
Defendant.

Subscribed and sworn to before me this 27th day of November, 1920.

[Notarial Seal] J. L. REED,
Notary Public for Alaska.

My Commission expires April 28, 1922.

Service of a copy of the above answer is hereby accepted, this 27th day of November, 1920.

E. E. RITCHIE,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 27, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.
[21]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Motion to Strike from Answer.

Now comes the plaintiff and moves the Court for an order striking from defendant's answer the first and second affirmative defenses thereof, upon the ground that the same are irrelevant and do not constitute a defense to plaintiff's cause of action.

Plaintiff further moves the Court that in case the Court should hold that the first paragraph of the first affirmative defense states alleged matters of fact that might constitute a defense and denies the motion to strike said paragraph, then and in such event that the Court order said paragraph to be made more definite and certain by setting forth in detail the acts alleged therein as "leasing property and doing business with the territory of Alaska."

E. E. RITCHIE,

Attorney for Plaintiff.

Service of the foregoing motion by delivery of copy admitted this 17th day of December, 1920.

J. L. REED,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 18, 1920. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy. [22]

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District Court, Territory of Alaska, Third Div.,
Valdez.

Page 61.

October 20th, 1920, Term of Court, Valdez, Alaska
—December 23d, 1920—29th Court Day.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Hearing on Motion to Strike.

Now on this day this matter came on to be heard upon the motion of plaintiff to strike portion of defendant's answer, the plaintiff being represented by its attorney, E. E. Ritchie, and the defendant being represented by his attorney, J. L. Reed.

WHEREUPON after argument had by respective counsel and the Court being fully advised in the premises,—

IT IS ORDERED that plaintiff's motion to strike certain portions of defendant's answer be, and the same is hereby denied.

To which ruling of the Court the plaintiff excepts and the exception is allowed. [23]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Reply.

Replying to the first affirmative defense set forth in defendant's answer plaintiff denies that at any time mentioned in its complaint it was engaged in doing a general business in the territory of Alaska.

II.

Replying to the first and second paragraphs of the second affirmative defense of said answer plaintiff alleges that the notices of nonliability referred to were posted as follows: One at the entrance of the bunkhouse, one at the entrance of the blacksmithshop, and one at the entrance of the mill which contained all the heavy machinery, all of which was attached to the land.

III.

Plaintiff denies each and every allegation of

paragraph 3 of the said second affirmative defense.

LYONS & RITCHIE,

Attorneys for Plaintiff.

Receipt of copy of the foregoing reply is admitted this 28th day of December, 1920.

J. L. REED,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 28, 1920. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy. [24]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Order Setting Aside Judgment in Cause No. 1029.

The plaintiff and defendant, by their respective counsel, agree, in open court, that the above-entitled cause may be heard and testimony adduced by both sides upon the merits of the case, and the Court orders that the judgment heretofore rendered in Cause No. 1029 of this court, entitled, R. A. W. Krampitz vs. Free Gold Mining Company, a corporation, be and the same is hereby opened up and

set aside for the purpose of this cause and to fully determine the right of claim of the plaintiff, the Alaska Homestake Mining Co., to be adjudged the owner of any of the property in controversy in said cause No. 1029.

Dated this 11th day of January, 1921, as of date, January 4, 1921.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 11, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.
Entered Court Journal No. 13, page No. 87. [25]

Filed in the District Court, Territory of Alaska, Third Division. Jan. 15, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Record on Appeal.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard, at

Valdez, Alaska, on Tuesday, January 4, 1921, before the Honorable FRED M. BROWN, Judge of said Court:

The plaintiff corporation being represented by its attorney and counsel, E. E. Ritchie, Esq.

The defendant being represented by his attorney and counsel, J. L. Reed, Esq.

Opening statements were made to the Court by the attorneys for the respective parties.

WHEREUPON the following additional proceedings were had and done, to wit: [26]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

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[27]

Mr. Reed moved for a judgment on the pleadings, which motion was, after argument by counsel, denied and defendant allowed an exception to the ruling.

Mr. RITCHIE.—Plaintiff offers in evidence the files in Cause Number 1029 of this court, being the lien foreclosure suit referred to in plaintiff's complaint. I will offer the entire record, although there is only a part of it that would be essential.

The files in said cause No. 1029 are admitted in evidence, without objection, marked Plaintiff's Exhibit "A," attached hereto and made a part hereof.

Mr. RITCHIE.—I will call Mr. Dimond.

Testimony of Anthony J. Dimond, for Plaintiff.

ANTHONY J. DIMOND, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. State your name. A. Anthony J. Dimond.

Q. You are a practicing attorney in the town of Valdez, Alaska, and have been for several years?

A. Yes, sir.

Q. Were you one of the officers of the Free Gold Mining Company which was doing business here some years ago?

A. Yes; I was secretary of the company, for some considerable length of time.

Q. Did that company at one time have a lease or rather an assignment of a lease from J. E. Whalen and William Quitsch which they had taken from the Alaska Homestake Mining Company, [28—2] the plaintiff in this case? A. Yes, sir.

Q. Was that in your custody as the secretary of the company?

A. It was in my custody at one time, but I have made a thorough search for it and have been unable to find it—I presume I gave it to Mr. Whalen or someone else who wanted to see it. I find in my custody all the other papers, the original lease and the assignment of the lease, but I can't find the lease which was executed in Seattle.

Q. Have you any idea where it is?

A. I haven't the slightest idea,—I don't know where it is; I wouldn't know where to look for it.

(Testimony of Anthony J. Dimond.)

Q. You have no memorandum showing that any particular person took it from your office?

A. No.

Q. Where is Mr. Whalen now?

A. The last I heard of him he was in Texas.

Q. Was the lease recorded? A. Yes, sir.

Mr. RITCHIE.—I am going to have Mr. Dimond identify a copy.

Mr. REED.—As I understand Mr. Dimond's testimony, the assignment of the lease is lost?

Mr. RITCHIE.—No, it is the lease that is lost.

Mr. REED.—They are both of record?

Mr. RITCHIE.—Yes.

Mr. REED.—I have no objection to the secondary evidence, if the Court will admit it, but I do object to the competency and relevancy of the testimony, not to the identity of the instrument.

Q. Please examine that—I believe you have already done so. (Handing witness paper.) [29—3]

A. Yes, sir.

Q. State whether or not that is a true copy, or substantially a true copy.

A. Yes, I have no doubt that is a true copy of the original lease dated May 1, 1918. I saw the original and had it in my possession for a long time.

Q. Did you file the original yourself?

A. No, I did not,—Mr. Whalen filed it, I believe; that is my recollection.

Q. Did you file the assignment?

A. No, I think Mr. Harvey Sullivan filed the assignment. He was the secretary of the company at

(Testimony of Anthony J. Dimond.)

that time. I drew the assignment.

Mr. RITCHIE.—We offer these copies in evidence.

Mr. REED.—Our objection at this time is based upon the fact that these leases are in no way binding upon the lienors in this case—they are binding upon the parties to the leases, but not on the lienors as affecting the title to the property involved in this action. We desire that objection to go to both of these assignments for the purpose of the record. The objection was by the Court overruled and defendant allowed an exception.

Mr. RITCHIE.—They constitute one contract. The second is simply a modification of the first and contains a copy of it, embraces it. I understand, Mr. Dimond, that you have examined this and say it is a copy of the original?

Mr. DIMOND.—Yes, it is.

Mr. RITCHIE.—This copy bears the certificate of Commissioner Love that it is a copy of the record.

The lease and assignment (copies) are marked Plaintiff's Exhibit [30—4] "B"; are attached hereto and made a part hereof.

Q. Do you know what that document is? (Handing witness paper.)

A. Yes, this document is the original assignment which was executed by J. E. Whalen and William Quitsch of the lease which has been introduced here in evidence as Plaintiff's Exhibit "B"—that is the original assignment.

(Testimony of Anthony J. Dimond.)

Mr. RITCHIE.—We offer this in evidence as Plaintiff's Exhibit "C."

Mr. REED.—We make the same objection.

Objection overruled; defendant allowed an exception.

The document is marked Plaintiff's Exhibit "C" and admitted in evidence; it is attached hereto and made a part hereof.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. REED.)

Mr. REED.—In regard to the cross-examination of Mr. Dimond, I will state at this time that my cross-examination will cover a point not brought out in the direct examination and necessarily I will have to make him my own witness for this particular question.

Mr. RITCHIE.—I have no objection to your asking him anything that has a bearing on this case.

Q. You say you are secretary of the company?

A. Yes, sir.

Q. And have been practically at all times?

A. I have been since—I think it was probably May, 1918, I was made secretary. Mr. Sullivan was the first secretary and he served a short time and then I was elected secretary.

Q. There was some conflict between the Free Gold and the men employed to go down there and work in regard to liens they might obtain on the property?
[31—5]

Mr. RITCHIE.—When?

(Testimony of Anthony J. Dimond.)

Mr. REED.—This was along on the fall of 1919, when Bill Quitsch was operating down there. I will ask you also in this connection, weren't there several papers drawn up in which efforts were made to get the men who went down there to work, to forego any claim of lien upon the property?

Mr. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception.

A. As I recollect, there was nothing done in the fall of 1919. In the spring of 1919 a paper was drawn up and signed by nearly all of the people that worked there at the time, in which they agreed to waive the right of lien. As I recollect it, that doesn't apply to the present lien claimants.

Mr. REED.—I don't think it affects these men at all. It was before these men had gone to work that this paper was drawn up and the men who signed that paper had all quit before the men who claim liens now had gone to work down there.

Mr. DIMOND.—That is my recollection of it. I can get the data from my office.

Mr. REED.—I wish you would. I know it doesn't affect these lien claimants, but I want to show the general situation in regard to the Free Gold Mining Co. having at one time had men go down there to work and release their claim of lien and subsequently not being able to get men to go down there, and that was continued as a policy.

Mr. RITCHIE.—We will let Mr. Dimond go and get his papers and I will call Mr. Quitsch. [32—6]

Testimony of William Quitsch, for Plaintiff.

WILLIAM QUITSCH, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. William Quitsch.

Q. You reside at Valdez and have for how many years? A. Since 1906.

Q. What is your occupation? A. Miner.

Q. That is practically the only occupation you have? A. Yes, sir.

Q. That has been your business during nearly all the time you have been here and is now?

A. Since the Cliff boom, I have been mining.

Q. Are you the William Quitsch who is named in the contract to lease of two mining claims in Harri-man fjord known as the Camp Bird No. 1 and Camp Bird No. 2, in which a lease was made by the Alaska Homestake Mining Company to J. E. Whalen and William Quitsch? A. Yes, sir.

Q. That lease was subsequently assigned to the Free Gold Mining Company? A. Yes, it was.

Q. That was a local corporation here?

A. Yes, sir.

Q. And you are a stockholder in the Free Gold Mining Co., are you not? A. Yes, sir.

Q. And also a stockholder in the Alaska Homestake Mining Company? A. Yes, sir.

Q. Were you one of the locators of these claims?
[33—7] A. No.

Q. Your first interest in them was when you and

(Testimony of William Quitsch.)

Whalen took the lease from the Alaska Homestake Mining Co.?

A. No, it was some time before that—I was sent down to sink a shaft. I sunk a shaft before that.

Q. You did some work for the Alaska Homestake Mining Co.?

A. Yes, under the direction of Mr. Topliff.

Q. When did you first go on there to work for the Alaska Homestake Mining Co.?

A. About a year before,—I don't know the date.

Q. Several years ago? A. Yes.

By the COURT.—What is the date the labor was begun under the lien?

Mr. REED.—In the fall of 1919. The liens set forth that they were all filed shortly after they quit work. The liens were filed January 8, 1920, and the labor was done three or four months prior to that time.

Mr. RITCHIE.—I think the work began about the last of August.

Q. The first lease to yourself and Jack Whalen is dated the 20th of October, 1917; then the next year you got the new lease which modified the terms of the first one and that is dated the first of May, 1918?

A. Yes, sir—I remember now what time I went there.

Q. Did you and Jack Whalen go to work in the fall of 1917 when you first got the lease?

A. Yes, sir.

Q. And you worked pretty steadily after that?

A. Yes, we started about the first of October—shortly after that.

(Testimony of William Quitsch.)

Q. You made an assignment in June, 1918, to the Free Gold Mining Company—that would be three years ago this coming summer?

A. Yes, sir. [34—8]

Q. Did you work on the ground a good deal in the summer of 1918? A. The entire summer.

Q. And were you there in 1919?

A. The entire year, yes,—as I remember.

Q. These boys that brought the lien foreclosure last year, Krampitz, Holland and others—were you out there when they went to work? A. Yes, sir.

Q. They went to work in the latter part of the summer of 1919, a year ago last summer. Were you with the men when they were working there that fall or at least part of the time? A. Yes, sir.

Q. Were you with them up to the time they quit, in January? A. Yes, sir.

Q. Some of them quit in December and four or five of them were working into January, according to the lien? A. Yes, sir.

Q. And you were there until then?

A. I was here in town part of the time, but I was in charge of the work.

Q. And since then, since the 8th of January, a year ago, has there been any work done on the property by the Free Gold Mining Co.? A. No.

Q. Have they had possession of it in any way or done anything about it at all?

A. I shoveled off the buildings the next winter, the winter after that.

(Testimony of William Quitsch.)

The COURT.—What time was it the Free Gold Company quit?

Mr. RITCHIE.—The lien says the 8th of January.

The COURT.—Is that the date of the last work these lien claimants did?

Mr. RITCHIE.—Yes, sir. [35—9]

The COURT.—That is the date that you claim the Free Gold abandoned or gave up the lease?

Mr. RITCHIE.—Yes—the abandonment according to our contention would be 30 or 31 days after they ceased to work, the provision being that the abandonment or forfeiture shall take place automatically after they cease to work for thirty days—that is in the lease.

Q. Do you know anything about a notice being put up there in the summer of 1919 by the Alaska Homestake Mining Company, stating that it would not be responsible for any labor employed by the Free Gold Mining Co.? A. Yes, sir.

Q. Were you there when it was put up?

A. Yes, sir.

Q. Who put that up?

A. Mr. Benson, the present postmaster at the Granite mine.

Q. Did you see the notices after they were put up?

A. Yes, sir.

Q. How many of them were there, and where were they posted?

A. There were three posted, one at the bunkhouse door, a log building; another was posted at the new mill building.

(Testimony of William Quitsch.)

Q. Where in the mill building?

A. Near the door.

Q. Inside or outside? A. Outside.

Q. And right at the entrance? A. Yes, sir.

Q. And the other?

A. It was posted at the blacksmith-shop.

Q. Where is the blacksmith-shop, close to the mill? A. About 200 feet away from the mill.

Q. And how far are these buildings from the entrance to the mine? [36—10]

A. The mill is about 200 feet away from the entrance to the mine.

Q. The buildings are all close together?

A. Yes, sir.

Q. How far from the water are these buildings?

A. I should say about 25 feet.

Q. These claims start practically at the water's edge? A. Yes, sir.

Q. And the buildings are on a moraine or low gravelly spot and the hill rises up from there and the main tunnel runs into the hill a short distance from the low ground? A. Yes, sir.

Q. And were these buildings put on the ground on posts?

A. They are put on mudsills; they are laid in the gravel.

Q. I mean the buildings themselves?

A. Yes, sir.

Q. Among the property which was made subject to the lien is a 7 foot Lane mill—is that still there?

A. Yes, sir.

(Testimony of William Quitsch.)

Q. That is the mill which was being used during the last work there? A. Yes, that was used.

Q. That is in what you call the new mill building? A. Yes, sir.

Q. How is that mill placed?

A. In the first place the building is placed on large timbers to keep it from sinking further into the gravel and the mill is placed on heavy timbers on top of this bottom timber, bolted.

Q. Then there is a 25-horse power Foos gas engine—is that in the same building? A. Yes, sir.

Q. How was that placed on the ground? [37—11]

A. In a very similar manner to that of the mill.

Q. On mudsills and bolted? A. Yes, sir.

Q. And where are the steel rails?

A. They are simply laid in the tunnel, underground.

Q. Tunnel tracks like any other mine?

A. Yes, sir.

Q. Were there some rails not in the track there, a few not in use?

A. No, not to amount to anything.

Q. How many cars were there?

A. There were two cars on the ground.

Q. What pipe was there?

A. There was some two-inch pipe and one-inch pipe, principally for conducting water.

Q. For draining the mine?

A. No, just for carrying fresh water to the machinery.

Q. Where did you get the fresh water?

(Testimony of William Quitsch.)

A. From a point about 400 feet up the hillside.

Q. This pipe was laid to convey the water from that source down to the mill and bunkhouse for use there? A. Yes, sir.

Q. Forge— That is in the blacksmith shop?

A. Yes, sir.

Q. Beltings and pulleys—those were connected with the Lane mill? A. Yes, sir.

Q. Tools—that I suppose is general tools, hammers, etc.? A. Yes, sir.

Q. Hose—what hose was that?

A. Air hose, mostly, from the end of the pipe to the machine.

Q. One ten by ten Ingersoll air-compressor? [38—12]

A. That was in another building, near the mill, I think.

Q. Close beside it? A. Yes, sir.

Q. How was that placed in position?

A. It was placed on heavy timbers and the compressor was bolted on to these heavy timbers.

The COURT.—The mill and engine and all were imbedded in the ground; they were not laid on it, on top of the gravel?

A. That was the scheme a good deal, to lay them on top, so they could be leveled up good and then they were filled up with gravel, after they had been placed in the correct position.

The COURT.—Were they sunk in the ground at all? A. No.

(Testimony of William Quitsch.)

(By Mr. RITCHIE—Continued.)

Q. Did you dig a trench and put them in?

A. We did, to a certain degree.

Q. You dug it enough to get a level bottom, of course? A. Yes, sir.

Q. One receiver? A. That is there.

Q. What does that refer to?

A. It receives the air.

Q. That is attached to the compressor?

A. Yes, sir.

Q. One 25-horse power Fairbanks Morse gas engine and equipment—where was that placed?

A. It was placed in a small building with the compressor and used in connection with the compressor.

Q. One 7 by 8 inch Dodge Crusher—where was that?

A. That was placed in the new mill building—placed in position [39—13] to be used as a crusher—in the same building with the Lane mill.

Q. It was placed the same way, on mudsills?

A. Yes, on the same frame, it was built up.

Q. The stopers, three jack-hammers and one six-horse power Fairbanks hoist engine and cable—where were they?

A. The stopers mostly were in the blacksmith-shop or in the mine and so was the hoist, the hoist being in the station inside the mine, near the shaft.

Q. One two-horse power Fairbanks Morse engine—where was that?

A. That was standing outside near the blacksmith-shop.

Q. One Gibson mill and equipment including con-

(Testimony of William Quitsch.)

centrators and four amalgam plates—where were they?

A. They were in the old mill building except the amalgam plates were with the Lane mill.

Q. The amalgam plates belong to the Lane mill?

A. I would say that they did, as long as we put them with the Lane mill. Of course, I didn't take them when I bought the Gibson mill.

Q. About those notices—they remained where they were posted for a long time? A. They did.

Q. Were they there when you left there?

A. Yes, sir.

Q. Do you know whether or not the men who were parties to this suit of Krampitz against the Free Gold Mining Co. saw them, of your own knowledge? Did you ever hear them discussing it or were you by when any of them read them?

A. Well, I wouldn't exactly say—it was impossible that they didn't see them. [40—14]

Q. Were they posted there before these men went to work? A. No, they were not.

Q. To refresh your memory, I will ask you if Benson didn't post them in the month of June?

A. Yes, June 25th—he marked it down with a pencil.

Q. He wrote the date down? A. Yes, sir.

Q. While these men went to work in August, according to their own statement?

A. Yes, sir; the last day of August.

Q. And the date that Benson wrote when he posted them, June 25th, was the correct date or

(Testimony of William Quitsch.)

within a day or so of it? A. Yes, sir.

(Questions by the COURT.)

Q. Did you ever talk to any of these men yourself about this notice and their rights?

A. Yes, sir.

Q. You discussed this notice with these men who filed these liens?

A. Yes, lots of time we were talking about that.

Q. Was the intention in putting this mill and the other machinery there that it was to remain there permanently as working machinery for the mine?

A. Yes, that was the intention. I had nothing to do with the management of the company at that time, I wasn't a director of the company.

Q. Where is Whalen now?

A. I don't know; the last I heard of him he was in the Texas oil fields.

By Mr. RITCHIE.—You have read the lease and you understand thoroughly that it provides that everything put on by the Free Gold [41—15] Mining Company during the period of the lease should remain there—that was the agreement?

A. Yes, all tools and equipment and machinery—it was my understanding that way.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Mr. REED.)

Q. Did you employ some of these lien claimants—I will state their names: John F. Keller, Kristop Lahz, Nick Meckem, William Holland, Christ H. Schiffer— Did you employ them on behalf of the

(Testimony of William Quitsch.)

Free Gold Mining Company? A. Yes, sir.

Q. You employed them all? A. Yes, sir.

Q. And you were the manager of the Free Gold Mining Company? A. Yes, sir.

Q. Do you remember employing Mr. Holland—
Do you remember the time you employed him?

A. Yes.

Q. And at one time, did you present him a waiver of lien on this property down there, in case he went to work for the Free Gold Mining Company?

Mr. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception.

A. I don't know that I understand you.

Q. Did you try to get Mr. Holland to go to work without claiming a lien on the ground or upon the machinery? Did you have a paper drawn up so if he signed it he would go to work without claiming any lien rights on the property?

A. No. [42—16]

Q. You did not?

A. No. I did have a paper drawn up by Mr. Dimond when I first got to be manager of the company. I presented it to Herman Hill, possibly, somebody else and everybody that seen it would simply turn away and say, "I don't need work that bad," so I wouldn't present it to anybody else.

Q. You don't recall presenting it to Mr. Holland?

A. No, sir; I did not.

Q. You don't recall presenting it to any of these lien claimants? The ones I have just named?

(Testimony of William Quitsch.)

A. No, I never presented it to anybody else any more.

Q. Now, in regard to all this property that was down there, at the time that this property was placed upon the ground—didn't all of that property belong to the Free Gold Mining Company, with the exception of one two-horse power Fairbanks Morse engine and one Gibson mill and equipment?

Mr. RITCHIE.—We object to that as irrelevant.

Q. At the time that all of this property with the exception of one two-horse power Fairbanks Morse engine and one Gibson mill and equipment, at the time it was placed upon these mining claims, the Camp Bird Number 1 and 2, did it not belong to the Free Gold Mining Company?

Same objection.

The COURT.—The objection will be overruled *pro forma* and I will consider it in considering the case.

Plaintiff allowed an exception to the ruling.

Q. Wasn't all of this property the property of the Free Gold Mining Company at the time it was placed upon the Camp Bird No. 1 and 2, except the two items mentioned?

Same objection, ruling and exception.

A. Yes, sir. [43—17]

Q. The two items I have just mentioned, one two-horse power Fairbanks Morse engine and one Gibson mill and equipment—that was the old property of the Alaska Homestake Mining Co.?

A. Yes, those three engines are included.

(Testimony of William Quitsch.)

Q. And all the rest of it was bought and paid for by the Free Gold Mining Company and put up on the ground? A. Except the forge.

The COURT.—What was the proportion of the property that was put on, would it be a quarter or what—the property that was on there?

A. One-sixth would be more nearly it.

The COURT.—That would be about $\frac{1}{6}$ of the whole? A. Yes, sir.

(By Mr. REED.)

Q. Now, all of this property, with the exception of these two items mentioned as being the property of the Alaska Homestake Mining Co., was that second-handed machinery, or was it new machinery?

A. That the Free Gold Mining Co. put on?

Q. Yes.

A. It was for the most part second-handed machinery.

Q. Is it not true, that practically all of it, the heavy pieces, were bought from the Granite mine?

A. Yes, sir.

Q. And taken away from the Granite and taken down to the Free Gold? A. Yes, sir.

Q. As to the character of the buildings down there, aren't they all single-board buildings, temporary structures, with corrugated iron roofs—single-board buildings? A. Yes, sir. [44—18]

Q. All of this machinery, the heavy machinery, to disconnect it from anything it was attached to, all it would require would be to take out a bolt or nut? A. Yes.

(Testimony of William Quitsch.)

Q. And you could move any part of that machinery and take it any place? A. Yes.

Q. It was moved down there, wasn't it?

A. Yes, sir.

Q. You say it was bolted to heavy timbers?

A. Yes, sir.

Q. That was to hold the machinery in place while it was being used? A. Yes.

Q. Now, in regard to taking that machinery out—could that machinery be taken apart and removed without any injury to the buildings?

A. Yes, sir.

Q. There is none of it cemented—there was no cement used in connecting any of it to the ground?

A. The only cement I found was under the muffler—it appeared to be cement, I don't know.

Q. You don't know whether it was cement or not?

A. No.

Q. And you don't know whether it held any machinery in place or not?

A. I don't know whether it was cement or not; it was some hard substance.

Q. In regard to one two-horse power Fairbanks Morse engine, there wasn't any connection there to the real property—it [45—19] was lying in the building without any attachment at all, wasn't it—it wasn't connected with the building at all, was it?

A. No, in the same manner as the compressor.

Q. It was just in place without being attached to any part of the realty or buildings? A. Yes.

Q. The same would be true of the Gibson mill and

(Testimony of William Quitsch.)

equipment,—that wasn't attached to the building, was it? Was that screwed to anything?

A. It was fastened to the foundation timbers—in the old mill building.

Q. You moved that, didn't you? A. Yes, sir.

Q. You took out the bolts and screws?

A. Yes, sir.

Q. And moved it without any damage to the foundation or the real property? Did you damage the real property? A. No.

Q. Now, Mr. Quitsch, at the time, or prior to the

Q. Now, in regard to the 25-horse power Fairbanks Morse gas engine that was in the same position, bolted down, as the compressor?

A. Yes, sir.

Mr. RITCHIE.—I admit that all of this machinery could be carried away without doing any damage to the real property, that is to the mining claims—I mean without any damage to the remaining real property. I admit it can be separated from the ground without doing any damage to the remaining premises.

The COURT.—The ground will be as good as it was before?

Mr. RITCHIE.—Yes.

Q. Now, Mr. Quitsch, at the time, or prior to the 8th day of January, 1919—that was the date that you and most of the men returned [46—20] from the mining claims to Valdez, wasn't it? A. Yes.

Q. Prior to that time there was some discussion about the liens of the men that worked there, was there not? A. Yes.

(Testimony of William Quitsch.)

Q. Was there quite a good deal of discussion among the men about getting their money?

A. When?

Q. I will ask you this question—shortly prior to January 8th, in the compressor building, in your presence and in the presence of Nick Meckem and William Holland, did you hear Holland ask whether in view of the notices that were posted their claims would be collectible, and you said, to these two men, well, the machinery is good for the labor, isn't it?

Mr. RITCHIE.—We object to that as irrelevant for the reason that no statement made by Mr. Quitsch could be binding on the Homestake Mining Company. It would be a matter of legal opinion anyhow. He was manager of the Free Gold Mining Co., not of the Alaska Homestake.

The COURT.—I will overrule the objection, *pro forma*, and it will be considered in connection with the legal phrase of the whole matter.

Plaintiff allowed an exception to the ruling.

Q. Did you make that statement?

A. I wouldn't say, but the chances are I did, because that was my belief at that time.

Q. That was your belief at the time, that the machinery that was down there belonging to the Free Gold Mining Co. was subject to these labor claims?

A. Yes, because it wasn't stated on the notice.

Q. And you conveyed that belief to practically all of these men [47—21] that were down there, at various times.

Objected to as irrelevant; objection sustained.

(Testimony of William Quitsch.)

Q. You conveyed that statement direct to all these men?

Mr. RITCHIE.—We object to any conversation between these men, between Mr. Quitsch and these claimants, as to their rights.

By the COURT.—He may ask if he told them that, and it will be considered the same as the other question.

Plaintiff allowed an exception to the ruling.

Q. Did you tell them that?

A. I don't know; I didn't make any special speech, I don't suppose, but I do believe that everybody thought that, understood it that way.

The COURT.—That was your own opinion?

A. That was my own opinion.

Q. And you stated that opinion to the men that were down there working, did you not?

Same objection, overruled and exception allowed plaintiff.

A. I believe I did, all right.

Q. And you stated it not once, but probably a dozen times,—at different times?

Objected to for the same reason, overruled; plaintiff excepts.

Q. Did you state it as many as a dozen times to these men, on different occasions?

A. Oh, I suppose so.

Q. You knew of the time they filed these liens—you were here in town and they told you?

A. Yes, sir.

Q. After they told you of having filed the liens,

(Testimony of William Quitsch.)

there was some talk among them of bringing suit for foreclosure? A. Yes, sir.

Q. And they conveyed that knowledge to you?
[48—22]

A. Yes, sir.

Q. And is it not a fact that up to March 19th, which is the date that this suit was filed to foreclose those liens—did you not, at a great many times between January 8th and March 19th, try to induce these men not to commence this suit, hoping to get the financial affairs of the Free Gold Mining Company straightened out?

Mr. RITCHIE.—We object to that as irrelevant and incompetent, first, because Mr. Quitsch was not representing the plaintiff in this case, the Alaska Homestake Mining Co. In the second place there was an automatic forfeiture on the 31st day after the Free Gold Company ceased work; and finally there is no lien given by the sweeping Alaska lien law on personal property except particular machinery such as dredges and mills.

Objection overruled, *pro forma*, and exception allowed.

Q. The question is, between January 8th and March 19th, after those liens were filed, did you not seek to avert suit against the Free Gold Mining Co. by those lien claimants? A. I did.

Q. And you made every effort down to March 19th to do that? A. Yes, sir.

Q. And you continued your efforts to avert a sale of the property up to the time that the sale was

(Testimony of William Quitsch.)

actually made, which was the 15th of June?

A. I didn't know anything about the sale.

The COURT.—What did you do?

Q. What did you do to try to stop them from bringing the suit—you told them to hold off, that you would get things straightened out, didn't you?

A. Yes, I asked them to wait as long as the law would let them, to give us a chance to reorganize.
[49—23]

Q. Did you tell them that you tried to get an extension of the lease from the Alaska Homestake Mining Company?

A. I am not sure whether we had a lease or not but we did consider a ten-year lease on it just the same.

Q. Did the Alaska Homestake Mining Company reject that proposition?

Mr. RITCHIE.—We object to that as irrelevant.
Objection overruled—plaintiff excepts.

Q. Did you telegraph for an extension of the lease to the Alaska Homestake Mining Company?

A. Yes, I believe I did.

Q. And do you know about the time you telegraphed them—was that after March 19th?

Mr. RITCHIE.—We want to see the originals or copies of the telegrams.

The COURT.—Yes, you have gone far enough into that; it can only be considered, if at all, that it might work a forfeiture.

Q. There was no notice of forfeiture served upon you as manager of the company by the Alaska

(Testimony of William Quitsch.)

Homestake Mining Co? A. No.

Q. And has not been to this date? A. No.

Q. And you say last winter you shoveled off the snow from the buildings? A. Yes, sir.

Q. Did you do that as representing the Free Gold Mining Co., the lessee?

A. I really won't say—yes, I did. I used the Free Gold Company money to do it with—I paid it out of the Free Gold Mining Co. money.

Q. Was that in the fall of 1920? [50—24]

A. Yes, in the winter or early spring some time.

Q. How long ago was it? A. A year ago.

Q. It might have been the fall or spring—do you recall just when?

A. It was the winter; it wasn't the fall or spring.

Q. There leases were made in the State of Washington between you and the Homestake people, drawn up in Seattle, were they, and signed out there?

A. I don't think so—I think they were drawn up here in Valdez.

Q. And signed out there?

A. I don't know about that.

Mr. RITCHIE.—The record shows that Mr. Whalen signed the second lease in Seattle for himself and as attorney in fact for Mr. Quitsch.

Mr. REED.—That is all.

Mr. RITCHIE.—At this time we move to strike from the record of the witness' testimony all statements as to who installed the various articles of machinery and equipment.

(Testimony of William Quitsch.)

Motion denied; plaintiff excepts.

(Question by Mr. RITCHIE.)

Q. To refresh your memory, I will ask you if you did not a short time ago state to me that the following articles were placed on the ground by the Alaska Homestake Mining Co. and were there when the Free Gold Mining Co. took possession, or when you and Whalen took possession—the Gibson mill, the concentrating table; a four-horse power Witte engine, two three-horse power Witte engines, a two-horse power Fairbanks Morse engine and hoist, blacksmith buildings and tools? A. Yes.

Q. You forgot them when Mr. Reed was asking you about certain [51—25] things that were there—he asked you if two or three machines were not the only things there—these were there?

A. Yes.

Mr. REED.—The two items mentioned here are not included in the sale; that is the reason.

Witness excused.

Testimony of A. J. Dimond, for Plaintiff (Recalled).

Mr. A. J. DIMOND, recalled.

(By Mr. REED.)

Q. Who, if anybody, has charge of the affairs of the Free Gold Mining Company at this time?

A. The Free Gold Mining Company is dead—I have all the papers in my possession, all the papers of the corporation.

Q. To your knowledge has the Free Gold Mining Company or anyone else authorized by it asserted

(Testimony of A. J. Dimond.)

any rights to the mining claims or any property involved in this matter since last winter?

Mr. REED.—I object to the statement that the Free Gold Mining Co. is dead.

The WITNESS.—I withdraw that; there is no activity at all in the company's affairs. It is moribund, you might say; they are not doing anything, and the company is heavily in debt and has no money to proceed.

Q. I will repeat the question: To your knowledge has the Free Gold Mining Company or anyone else authorized by it asserted any rights to the mining claims or any property involved in this matter, since last winter?

A. As far as I know, it has not. [52—26]

Q. Is there any other person than yourself or Mr. Quitsch here who represents the Free Gold Mining Co. in any way? A. No.

Q. You are secretary of the company?

A. I am the secretary of the company and Mr. Quitsch manager, I think; we had a treasurer but I don't know who it is now—I think it was Harry Wilson who has gone outside.

Q. The company as far as you know has not done any work on the property since Mr. Quitsch shoveled the snow last winter? A. That is true.

Mr. RITCHIE.—Paragraph 7 of our complaint recites the posting of the notice of nonliability for labor, and a copy is attached to the complaint. That paragraph is not denied. I intended to bring over a copy of that notice and introduce it as an

(Testimony of A. J. Dimond.)

exhibit and I ask permission to do that.

Mr. REED.—We don't deny the fact that it was posted or the wording of the notice, but we make the same objection that it is not binding as affecting the title to the property involved.

Objection overruled; defendant excepts.

The notice is admitted in evidence as Plaintiff's Exhibit "D," is attached hereto and made a part hereof.

Mr. RITCHIE.—That is all.

(By the COURT.)

Q. Mr. Dimond, you were active in the management of this company while it was operating?

A. Yes, sir.

Q. Do you know about the employment of these men whose liens are involved here—do you know of their original employment?

A. No; Mr. Quitsch was manager; he employed them.

Q. This paper that you drew up here, while it is not in the record [53—27] —that was made on the part of the company, to get men to accept employment at that time and to take their pay on bedrock—take their pay out of the cleanups?

A. It was early in the spring of 1919 that was done and later it was abandoned. I don't recollect now just the exact time, but some time during the summer I drew up a paper for Mr. Quitsch providing they should be paid on bedrock and as he testified to-day, he told me he mentioned it to one or two men and they refused to go to work and it wasn't

(Testimony of A. J. Dimond.)

followed after that. The men who did sign the paper originally were all stockholders and were all heavily interested in the company as stockholders and were anxious to see it go ahead and for that reason went to work and voluntarily waived a right to file a lien.

Q. Are any of these claimants in this case stockholders?

A. Mr. Quitsch is; I don't think the rest are but Mr. Holland may be.

Q. Has Mr. Quitsch filed a lien here?

A. No.

Q. You had no personal talk with any of these men having liens here?

A. As far as I recollect now, I never had any conversation with any of them; I certainly had nothing to do with their employment. I may have spoken to them about the employment, but I didn't have any authority to employ them, and as far as I recollect, I didn't advise them at all.

(By Mr. REED.)

Q. You say you had no conversation yourself with any of these men and anything that Mr. Quitsch may have told them was not in accordance with any authority, as coming from you relative to the matter? [54—28]

A. That is my recollection. I can't recollect that I had any talk with any of them. I may have discussed it with Mr. Quitsch but I don't recollect it; we talked over so many things concerning the property that I can't say now what I said to Mr.

(Testimony of A. J. Dimond.)

Quitsch. I am quite positive, though, that I never talked to the claimants.

Q. Have you a copy of this waiver of lien?

A. I have a copy of the contract made in the spring; that is dated May 20, 1919. It is five pages and a half long and it contains this provision—all persons performing work or labor—

Mr. RITCHIE.—We object to that.

Objection sustained.

(By Mr. REED.)

Q. As an officer of the Free Gold Mining Co. I will ask you this question: Has the Free Gold Mining Co. ever been served by the Alaska Homestake Mining Co. with any notice or declaration of forfeiture obtained under the terms of this lease?

Mr. RITCHIE.—We object to that.

Objection overruled plaintiff allowed an exception.

A. So far as I know, it has not.

Mr. RITCHIE.—In order to keep the issues clear, I move to strike the questions propounded by the Court to Mr. Dimond and Mr. Dimond's answers thereto.

Motion denied; plaintiff allowed an exception.

Witness excused.

Mr. RITCHIE.—Plaintiff rests.

Mr. REED.—I wish to ask for the dismissal of plaintiff's cause of action in this case by reason of the fact that the plaintiff [55—29] has failed to make a *prima facie* case.

By the COURT.—I would rather take the matter

(Testimony of R. A. W. Krampitz.)

up at the conclusion of the case. At this time the motion will be denied and exception allowed.

DEFENSE.

Testimony of R. A. W. Krampitz, in His Own Behalf.

R. A. W. KRAMPITZ, the defendant, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. REED.)

Q. You are the defendant in this case?

A. Yes, sir.

Q. And you were the plaintiff in Cause #1029 in which suit was brought to foreclose your lien and certain labor liens assigned to you and which went to a judgment? A. Yes, sir.

Q. You worked on the Free Gold Mining Co. property in the fall of 1919—when did you quit work?

A. I quit work, I guess, the 8th day of January, 1920.

Q. And you came to Valdez with the others?

A. Yes, sir.

Q. And Mr. Quitsch came with you at that time?

A. Yes, sir.

Q. How long did you work there, how many months?

A. Why, I believe I got down there the 10th of November, 1919, either the 10th or 11th.

Q. And your wages were not paid and you filed

(Testimony of R. A. W. Krampitz.)

your lien and brought this suit on behalf of yourself and the other lien claimants?

A. Yes, sir.

Q. Now, going to the question as to the character of this property down there, I will ask you to state in regard to the 7-foot Lane Mill—how was that in place? [56—30]

A. Why, I believe that Mr. Quitsch described that part pretty well—I think that it is put in place as he described it and that it can be removed very handy and easy.

Q. All of this property practically came from the Granite Mine? A. That is what I am informed.

Q. Just describe the building in which it was placed—how about the side walls? Were they thick walls or just one-boarded wall?

Mr. RITCHIE.—We object to that, as the buildings are not in issue.

Q. How was it, was it bolted down?

A. No, I didn't see any bolts in it.

Q. You didn't see any bolts in it?

A. No, the buildings are put up like an ordinary building and I don't think it is very hard to move those things, if a man has to move them.

Q. What about the one 25 h. p. engine?

A. That is put up on sills and just bolted down.

Q. Was any of this machinery cemented to the ground? A. Not to my knowledge.

Q. Was any of this machinery placed on the ground itself? How was it all placed, on timber?

A. I think it was all placed on timbers, sills.

(Testimony of R. A. W. Krampitz.)

Q. And the steel rails, cars, pipes, tools, etc.—that was all loose personal property? A. Sure.

Q. The one 10 by 10 Ingersoll Air-compressor—what building was that in?

A. That is in a separate building from the mill building, only one board walls and I believe tar paper on the outside of it; just rough boards used for the building.

Q. Was that bolted, the air-compressor? [57—31] A. That was bolted down on sills.

Q. One receiver—where was that?

A. Outside of the building. It was just connected up with the pipe.

Q. Was it fixed in any way to the ground?

A. No.

Q. How about the Fairbanks-Morse 25 h. p. gas engine and equipment—was that bolted?

A. I suppose it was—it had to be or wouldn't stay in place.

Q. And that was inside of the building?

A. Yes.

Q. And in regard to the one 7 by 8 Dodge Crusher—what building was that in?

A. That was in the mill building, up above the mill.

Q. Was that bolted down?

A. It was bolted to some fixture there because it is above the mill.

Q. Three jack-hammers and one 6-horse power Fairbanks hoist engine and cable—that was disconnected from anything, was it?

(Testimony of R. A. W. Krampitz.)

A. It is moved now—yes, it was in the mine, but is moved now.

Q. It was in the mine? A. Yes.

Q. Was it in any way connected with the mine?

A. I couldn't tell you in what way it was connected—whether it was only setting on its own weight or if it was screwd down. I couldn't tell you anything about that, but it has been moved.

Q. In the operation of the mine was that moved around a good deal?

A. No, it was always stationary; it was in one place.

Q. And you are not sure whether that was bolted to anything or not? [58—32]

A. I couldn't tell you.

Q. One two-horse power Fairbanks engine and one Gibson mill and equipment—where were they?

A. There was an engine or two of them lying around on the hillside and it seems to me that this Gibson mill was—I don't know whether she was in place or not but she was in a kind of old shack there, an abandoned shack.

Q. Was that in any way connected?

A. Not to my knowledge.

Q. How about the Fairbanks engine—was that in any way connected? A. No, it was loose.

Q. And the concentrators and three amalgam plates? A. They were connected.

Q. I will ask you this question: Could this machinery be moved out of these buildings without in any way impairing the buildings?

(Testimony of R. A. W. Krampitz.)

A. Sure it could.

Q. Without damaging them? A. Yes, sir.

By the COURT.—The machinery is still on this ground? The machinery you sold at this sale?

Mr. REED.—Most of it—some of it has been moved.

The COURT.—I will change my ruling then—when you asked about the buildings I thought they were buildings not containing machinery.

Q. Most of this machinery was in buildings?

A. Yes, sir.

Q. Describe the character of the buildings. As to whether there are side walls, and the ground and back walls—describe their thickness. [59—33]

A. They are only one-inch boards, that is the compressor-room, as far as I could see—I haven't examined them, but that is the way they appear to me, and they are just put up as an ordinary shack here in Valdez, but of course the mill building is put up a little bit better but I think they are only single boards. The mill building, I think, is either shiplap or rustic on the outside, but I think they are only single boards, though, but there is a double door that can be opened for any purpose, to take in large or small stuff.

Q. Now, in regard to the conversation which occurred shortly prior to January 8th in the concentrator-room, at which Mr. Quitsch was present and Nick Meckem was present—state what that conversation was.

Mr. RITCHIE.—We object to the conversation as

(Testimony of R. A. W. Krampitz.)

incompetent and irrelevant and not binding on the Alaska Homestake Mining Co.

Q. And what Mr. Quitsch said about it?

The objection was overruled and plaintiff allowed an exception.

A. It was in the compressor-room; I don't know who was there—there were some of the fellows there and he made a remark, "The chances are pretty slim about getting our money"—I think it was Nick Meckem or somebody—and Quitsch made the remark that the machinery ought to be worth enough to pay the labor, that was on the ground, because he thought that it was in the Free Gold Mining Co., that we were dealing with the Free Gold Mining Co.—we were no Homestake Mining Company men.

The COURT.—Who thought that?

A. Mr. Quitsch and I did too and I guess all the rest of them did.

Mr. RITCHIE.—We move to strike what the gentlemen thought.

The COURT.—Yes, it may be stricken.

Q. Was there any other conversation between you and Mr. Quitsch [60—34] relative to the same subject, growing out of the notices that were posted down there, in regard to the machinery?

Same objection; overruled; plaintiff excepts.

A. Well, there was some more talking, about on the same line—I don't know whether the same words were used or not.

(Testimony of R. A. W. Krampitz.)

Q. (By the COURT.) You read these notices yourself?

A. Yes, sir.

(Questions by the COURT.)

Q. And saw it referred to a certain record here in the Commissioner's office and the book and page?

A. I couldn't say; I read the notice and I see that the notice was only applying to the two mining claims and I didn't pay any attention because there was nothing said about any machinery.

Q. Do you recollect that there was something said about a lease? A. I couldn't tell you that.

Q. You never came to the Commissioner's office to look up the lease? A. No, I never did.

(By Mr. REED.)

Q. State the conversation you had with Mr. Quitsch—what was said by him about the machinery.

A. I made the statement before that Mr. Quitsch thought that the machinery would bring more money than what the liabilities were of the Free Gold Mining Co.

Q. Did he state that?

A. That is the way he put it—I don't know if he made that very statement or not, but that is the way he put it, that the machinery would cover the labor.

Q. Now, after your liens were filed on January 10th, did Mr. Quitsch have any conversation with you and the other lien claimants [61—35] in regard to not bringing an action to foreclose your lien?

Mr. RITCHIE.—We object, as irrelevant and incompetent.

(Testimony of R. A. W. Krampitz.)

Objection overruled; plaintiff excepts.

A. He did.

Q. How many times did he endeavor to do this?

A. That is hard to say. He saw me pretty near every other day or a couple of times a week. Every time we met we had a talk about it and I told him if the Free Gold Mining Co. could do anything I wouldn't foreclose the lien or bring suit against them, because I didn't want them to spend any money, I would rather have them spend it on the ground and I gave them all the time there was, until the 19th of March, and after that Mr. Quitsch thought he could make good yet and I told him if he could it would suit me very well.

Q. Did you talk with him on the same proposition after that?

A. Sometimes he talked a little about it after I filed the suit, several times.

Q. Now, is there anything else you want to state in regard to this case that I have omitted to ask you the specific questions about?

A. I don't know; I don't think so—I don't think there is.

Mr. REED.—That will be all then.

Cross-examination.

(By Mr. RITCHIE.)

Mr. RITCHIE.—I desire to move to strike all of the witness' testimony as to conversations with Mr. Quitsch about his wages.

Motion denied; plaintiff allowed an exception.

Q. Mr. Krampitz, when you made your arrange-

(Testimony of R. A. W. Krampitz.)

ment with Mr. Quitsch to go over there to work, did you ask him what assurances he could give you that you would get your wages? [62—36] A. No, sir.

Mr. RITCHIE.—That's all.

(By the COURT.)

Q. What is the total amount involved in this case—there are how many claimants? A. Six.

Q. What is the total claimed.

A. I couldn't just exactly tell you but it is about \$1,900, I believe.

Mr. REED.—It is about \$2,000.

Q. What is the amount of the cleanup?

Mr. REED.—The amount that they realized from the assay office was \$892.70 and there is \$111.50 of that amount that is in controversy in this action on the claim of 12½%.

Q. That was all the gold brought?

Mr. REED.—Yes, sir.

Mr. RITCHIE.—About \$780 is undisputed as belonging to the lien claimants.

Q. How much of your claim has been received?

A. I received for my share about \$40.40, I think.

Q. What is the amount of your claim?

A. The amount of my claim was \$265, I believe, or \$263,—I can't just state to the cent now.

Q. Who bought the machinery? A. I did.

Q. Are you able to make any disposition of it if you have the right to do it?

A. The hoist is practically disposed of now and also the Gibson mill—I don't know who they belong to but I bought them in.

(Testimony of R. A. W. Krampitz.)

Q. Did you sell the machinery that was on there before the Free [63—37] Gold Mining Co. took hold—there was certain machinery that was on the property before?

Mr. REED.—Yes, sir. These two items of the Homestake Co. and all of the Free Gold Co. were included in the sale and bought in by Mr. Krampitz.

The COURT.—That is what Mr. Quitsch said he would figure as about one-sixth of the value of the whole?

Mr. REED.—Yes, sir.

(By the COURT.)

Q. You have talked to these men who assigned these claims to you, at the time they went to work and during the time they worked, about their claim?

A. Yes, sir.

Q. And you say they went on the theory that the machinery was good for their wages?

A. That is what we thought, it ought to be, but I wasn't sure. Somebody made a remark about that notice posted up there and Mr. Quitsch said then, the machinery ought to be good for it because that don't apply to this notice.

Q. You never went to look at the lease itself?

A. No.

Mr. RITCHIE.—At this time we move to strike from the record and the consideration of the Court the discussion just held by the Court with the witness as to his understanding and conversations.

Motion denied; plaintiff allowed an exception.

Mr. RITCHIE.—I want to ask Mr. Krampitz a

(Testimony of R. A. W. Krampitz.)

question—Mr. Krampitz, what would you say was the fair and reasonable value of all the machinery and tools there on the ground?

A. Well, I made an offer of \$2,000.

Q. That was the value about the time of the sale and you consider it about the same value now?
[64—38]

A. Yes, sir.

Q. Taking from the amount whatever you sold to Bill Quitsch?

A. I didn't figure that in the first place.

Q. Leaving out what has been sold to Billy Quitsch, you figure that \$2,000 was a fair valuation?

A. Two thousand dollars is a fair value for that machinery.

Mr. REED.—The balance is on the property?

A. Yes, sir.

Witness excused. [65—39]

Testimony of William Holland, for Defendant.

WILLIAM HOLLAND, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. REED.)

Q. You are one of the lien claimants and assigned your claim to Mr. Krampitz for the purpose of making collection of same? A. Yes, sir.

Q. And you worked down on this property probably as long as any of these other claimants?

A. I was the first man to go down there—we

(Testimony of William Holland.)

worked one day in August.

Q. I will ask you, before you went down there, was anything said to you at the time by Mr. Quitsch as to waiving your lien rights, was any paper presented to you? A. Yes, sir.

Q. And did you sign it? A. No, sir.

Mr. RITCHIE.—All these questions go in under my objection.

Objection overruled and exception allowed.

Q. You say you went to work in August?

A. Yes, sir.

Q. And your claim was for wages for work done prior to January 8th? A. Yes, sir.

Q. And you quit with the rest of them on January 8th and came to Valdez? A. Yes, sir.

Q. Did you have any conversation with Mr. Quitsch relative to the machinery? A. Yes, sir.

Q. State what those conversations were.

A. Why, he told me that the machinery was good for the wages—that this notice he didn't think covered the machinery.

Q. And how many times did he make that statement to you? [66—40]

A. I couldn't tell you,—several times.

Q. And now in regard to the buildings there—describe those buildings briefly, the thickness of the walls?

A. Those buildings are one-inch boards, single walls, and that is all that any of them are.

Q. Were you there when any of this machinery was put in? A. No, sir.

(Testimony of William Holland.)

Q. What would you say as to how this machinery was put in place—how was it connected?

A. It was set down on timbers and screwed down to the timbers.

Q. And could that all be removed by loosening the bolts and screws. A. Yes, sir.

Q. Without any damage to the timber it was setting on? A. Yes, sir.

Q. And could you move the machinery without damage to the buildings? A. Yes, sir.

Q. Would any of the boards of the building have to be removed to take the machinery out?

A. No, I don't think so.

Q. And some of this property is disconnected with the ground entirely? A. Yes, sir.

Q. Now, you had conversations with Mr. Quitsch after he came to Valdez? A. Yes, sir.

Q. And up about March 19th? A. Yes, sir.

Q. State if you recall what he said about filing suits.

Mr. RITCHIE.—We object to any conversations between the witness [67—41] and Mr. Quitsch after he quit work.

Objection overruled; plaintiff excepts.

Q. State what the conversation was.

A. He said that he was trying to get a lease from the Homestake people and it was tied up to the Free Gold again—we would all get our money—he thought they would reorganize and go to work again.

Q. Did he say he got the lease after that?

A. He got the lease, I believe, ten days after we

(Testimony of William Holland.)

filed on the machinery, if I remember right,—something like that.

Q. In regard to the gold amalgam that the lien was placed upon—was that brought up from the ground at the time we made your claim?

Mr. RITCHIE.—We object as irrelevant.

Objection overruled; plaintiff excepts.

A. No, sir, it was brought up before then.

Q. Who brought it up? A. Billy Quitsch.

Q. It was brought up before January 8th?

A. The gold brick, you mean?

Q. Yes.

A. Yes, it was brought up—I couldn't tell you, in the middle of December some time.

Q. He came to Valdez and then returned and after he returned what did he tell you—what did he tell the boys in regard to their work?

Objected to as irrelevant.

Objection overruled; plaintiff excepts.

A. Why he said, "It is all off; we will pack up everything and go to town and quit working," he said.

Q. And you all came to town? [68—42]

A. Yes, sir.

Q. Did you have any conversation with him in regard to your liens or the notices posted?

A. Not as I remember; at that time I did not.

Witness excused.

Testimony of J. H. D. Bouse, for Defendant.

J. H. D. BOUSE, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. REED.)

Q. You are deputy United States marshal?

A. Yes.

Q. I will ask you to state whether or not on or about April 30th of this year Mr. Ritchie, on behalf of Mr. C. P. Topliff and claiming through the Alaska Homestake Mining Co., filed in your office an affidavit of claim to 12½% interest in the gold that was then being offered for sale?

A. Yes, sir; about that time.

Q. This is a copy of the affidavit? (Handing witness paper.)

A. Here is the original (producing paper).

Q. Now, that gold was sold on May 15, 1920?

A. May first, wasn't it?

Q. Yes, May 1, 1920? A. Yes, sir.

Q. I will ask you, was there any affidavit or any other claim of interest filed in regard to any of the other property that was sold in this suit?

Mr. RITCHIE.—We object, on the ground that there is no foundation for it in the pleadings.

Objection overruled; plaintiff allowed an exception. [69—43]

Q. Was there any other claim of interest, in regard to this machinery, by the Alaska Homestake Mining Co. or anyone else prior to the sale on June

(Testimony J. H. D. Bouse.)

first—of the machinery? A. No, sir.

(Same objection.)

The COURT.—What is the purpose of this?

Mr. REED.—Our purpose is to show that the Alaska Homestake Mining Co. had knowledge of this whole proceeding from the time that these claims were filed up to the time judgment was rendered, up to the time the sale was made, and now after a long period of time, when the sale and all has been made, they come into a court of equity and ask that a judgment be set aside for the purpose of claiming and showing an interest in the property.

(Argument by Mr. Ritchie.)

The COURT.—I think it is a fair presumption that the Alaska Homestake Mining Co. had full knowledge of all these proceedings, the work done down there and all about it. I think that is as fair a presumption as the other one.

Mr. REED.—Mr. Bouse states that the Alaska Homestake Mining Co. prior to this did not make any claim to their interest or title in this property.

Mr. RITCHIE.—And we move to strike that much of the record because there is nothing contained in the pleadings that has any reference to it.

Motion denied and exception allowed.

Witness excused.

Mr. REED.—We rest. [70—44]

REBUTTAL.

Mr. RITCHIE.—I desire to be sworn.

Testimony of E. E. Ritchie, for Plaintiff (In Rebuttal).

E. E. RITCHIE, sworn as a witness for the plaintiff, in rebuttal, testified as follows:

About the first of May, I don't know exactly what date it was, it may have been late in April and may have been the first week in May, at the request of Mr. Topliff I drew up for him an affidavit provided for by the section of the statute, setting forth his claim to 12½% of this gold amalgam. That, of course, is included in the suit which we have brought here. Mr. Topliff's interest has been assigned back to the Alaska Homestake Co. for the purposes of this suit, in order to avoid a multiplicity of suits. Mr. Topliff is still the owner, the equitable owner, of that 12½% if the Alaska Homestake Co. recovers it, but for the purposes of the suit he assigned it back. I have the assignment in writing which I will bring over here and file—he assigned it back to the Alaska Homestake Co. in order that it might be included in the suit.

Mr. REED.—As far as you know, did the Alaska Homestake Mining Co. have any knowledge of the lien and the suit to foreclose the lien and the sale?

Mr. RITCHIE.—I couldn't answer that except in this way—that I was gone from Valdez from the 7th of December to the 23d of April and I had no knowledge of this suit, never heard of it in Seattle and knew nothing about it, until the day

(Testimony of E. E. Ritchie.)

or possibly two or three days after I arrived here, which was in the evening of the 23d of April, 1920. Mr. Hemple is a heavy stockholder and he didn't return here until the middle of May. I saw Mr. Hemple two or three times in Seattle in the month of April and discussed several topics of interest to us and probably [71—45] conditions in general, and if Mr. Hemple at that time had any knowledge of this suit, he didn't mention it to me, and the first time I talked to him about it was a few days after he returned, along about the middle or last of May, when he came over and talked to me about it.

Mr. REED.—You don't know whether any of the officers of the Alaska Homestake Mining Co. had any knowledge of these proceedings?

A. As I say, I never heard of the suit in Seattle. I saw Mr. Eckern there and Mr. Edmund Smith there—they are both stockholders. The Alaska Homestake Mining Co., as the record shows, was not made a party, and there was no publication in the newspapers, no notice. It would only be an opinion, but I don't believe any of those men in Seattle knew about it, because they didn't talk to me about it, although they were talking to me about other business up here. I am quite sure that Mr. Hemple's first knowledge of it was after he came up here the middle or last of May, because a few days after he arrived he came and talked to me about it, as though it was a new subject to him.

Mr. REED.—Didn't you state at one time in my presence that the Alaska Homestake Mining Co.

(Testimony of E. E. Ritchie.)

had decided not to plead in this case or take any action in relation to the machinery?

A. No, I didn't tell you that. I think what I told you was this—that they wanted to do it, but they were slow about putting up the costs and I told Mr. Hemple from the start that I would take the case on a contingent fee, but I certainly would not advance the costs. I didn't get Mr. Hemple and Mr. Topliff to advance the costs until September, which is the reason the suit was not brought sooner. [72—46]

Q. And you didn't know when they obtained knowledge of it?

A. I don't know; they might have known about it as long as I have; or they might have known about it last spring, but no one mentioned it to me in Seattle and I never heard of it until I got back here.

The COURT.—Were you the attorney for the Alaska Homestake Mining Company before?

A. Only in a general way. Mr. Lyons drew up the articles of incorporation and we got a block of stock for his services, and when they wanted anything done they used to write or wire me, after Judge Lyons left here. There was an understanding—I was not receiving any retainer—but there was an understanding that in anything affecting their interest, when I was here, I would look after it.

The COURT.—Did you know there were unsettled claims against the company?

A. I knew nothing about it; I took no interest in

(Testimony of E. E. Ritchie.)

it except this, that just before I left here, the 7th of December, I did hear talk that they were not doing very well down there, but that was all.

Mr. REED.—You drew up this notice of non-liability, you did that for them? A. I did that.

Mr. REED.—In June, 1919?

A. Yes, June, 1919.

Mr. REED.—Was there any stockholder or officer of the company here then?

A. As far as I know, there is no stockholder in Alaska, excepting Mr. Quitsch and myself, and Mr. Hemple when he is here. Mr. Hemple is here about half the year and away about half the year. [73—47]

**Testimony of William Quitsch, for Plaintiff.
(Recalled).**

WILLIAM QUITSCH, recalled.

Mr. RITCHIE,—Mr. Quitsch, do you know of any other stockholders here?

A. Charley Fisher and Kristop Lahz.

(Questions by the COURT.)

Q. It develops that you were president of this Free Gold Mining Co.—were you a stockholder in the Alaska Homestake Mining Co.? A. Yes.

Q. Were you any officer of that company?

A. I am now; I wasn't then.

Q. You know, of course, of these claims, that they were not paid, and you tried to negotiate a settlement—that is already in evidence.

Mr. RITCHIE.—At that time you were not an

(Testimony of William Quitsch.)

officer of the Alaska Homestake Mining Company—you were a stockholder? A. Just a stockholder.

Q. You were elected a director at a meeting held in November, 1920?

A. Yes, I didn't hold any office before that time.

Q. You say besides yourself and myself and Mr. Hemple, the only stockholders you knew were Charley Fisher and Kristop Lahz? A. Yes, sir.

Witness excused.

Testimony closed.

I do hereby certify that I am the Official Court Stenographer for the above-entitled court; that as such I reported the proceedings had in the above-entitled cause, to wit, Alaska Homestake Mining Company, a corporation, vs. R. A. W. Krampitz; that the above is a full, true and correct transcript of the evidence introduced and proceedings had at the trial of said cause.

I. HAMBURGER.

Valdez, Alaska, January 12, 1921. [74]

In the District Court for the Territory of Alaska,
Third Division.

No. 1029.

R. A. W. KRAMPITZ,

Plaintiff,

vs.

FREE GOLD MINING COMPANY, a Corpora-
tion,

Defendant.

Judgment and Decree.

This cause came on regularly for hearing before the Court without a jury on the 17th day of April, 1920. That plaintiff was represented by his attorney, J. L. Reed, Esq. The default of the defendant having been duly entered according to law. Thereupon the plaintiff introduce evidence, to wit, the oral testimony of R. A. W. Krampitz and J. L. Reed, and certain exhibits in support of the allegations of plaintiff's complaint. Thereupon the Court took said cause under advisement and rendered an oral opinion finding generally for the plaintiff and against the defendant, and directed that its decision and judgment be prepared and entered in accordance therewith. Thereafter and on the 17th day of April, 1920, the Court made and entered herein its findings of fact and conclusions of law, its said decision herein.

WHEREFORE, the findings and decision and premises considered, and the Court being fully advised in the premises, **IT IS ORDERED, ADJUDGED AND DECREED** as follows, to wit:

1. That by reason of the work and labor performed and done by plaintiff and his assignors upon, in and about said mills, machines and machinery and upon said dump or mass of mineral bearing earth, ore, rock and gold in the production thereof, hereinafter more particularly described, at the instance of the defendant, the owner and reputed owner thereof, the said plaintiff now has a first valid lien upon said mills, machines and machinery and upon said dump or mass of mineral bearing

earth, ore, rock and gold and against each and all the separate classes of property herein described for and in the sum of [75] nineteen hundred and 10/100 dollars, (\$1900.10), with interest thereon from the date hereof until paid at the rate of eight per centum per annum, together with plaintiff's costs and disbursements incurred in this action to be taxed by the clerk of this Court at \$383.30, and such costs and disbursements shall include the sum of \$50.70 for the preparing, filing and recording of plaintiff's said liens and the further sum of three hundred (\$300.00) dollars as plaintiff's attorneys' fees herein, and all other taxable costs and disbursements of plaintiff incurred herein.

2. That all and singular the premises, property and said mills, machines and machinery and said dump or mass of mineral bearing earth, ore, rock and gold hereinafter described, or so much thereof as may be sufficient to pay the amount due to plaintiff as shown in the last foregoing paragraph of this judgment, together with interest, costs and accruing costs, and which may be sold separately without material injury to the parties interested, shall be sold at public auction by the United States Marshal for the Third Judicial Division of the Territory of Alaska, according to law and the practice of this Court, and at such sale the plaintiff or any other person may become purchaser; that immediately upon such sale taking place the marshal shall execute and issue to the purchaser or purchasers the proper bill of sale or bills of sale for said property, and thereupon said purchaser or purchasers shall

be entitled to the sole and immediate and exclusive possession thereof.

3. That the said marshal out of the proceeds of said sale shall pay the amounts due under this judgment in the following order:

First: Retain his fees, disbursements and commissions of sale.

Second: Pay to plaintiff's attorney costs, disbursements and attorneys' fees or hereinbefore set forth.

Third: Pay to plaintiff or plaintiff's attorney the full amount due to plaintiff, to wit, the sum of \$1,900.10, or so much thereof as said proceeds of sale will pay of the same. [76]

4. That the said defendant and all persons claiming or to claim under it, and all persons having liens subsequent to plaintiff's liens upon said mills, machines and machinery and said dump or mass of mineral bearing earth, ore, rock and gold hereinafter described, and their and each of their heirs, assigns and personal representatives, and all persons claiming to have acquired any interest in said mine and property subsequent to the time plaintiff and his said assignors commenced to labor and render services whereby plaintiff liens were acquired, be forever barred and foreclosed of and from all equity and claim of, in and to said property and every part and parcel thereof after the delivery of said marshal's bill of sale.

5. That upon the delivery of the said marshal's bill of sale the purchaser or purchasers be given immediate title and possession of said prop-

erty hereinafter described, and that any of the parties to this action or any other person or persons, who may be in possession of said property or any part or parcel thereof, shall deliver possession thereof to the said purchaser or purchasers upon the production of the said marshal's bill of sale therefor.

6. That the property, mills, machines and machinery and said dump or mass of mineral-bearing earth, ore, rock and gold on which plaintiff has a lien as aforesaid, and which is to be directed to be sold by this judgment and decree, is situated, described and identified as follows:

One seven foot Lane Mill; one 25 h. p. Foss gas engine; steel rails, cars, pipes, forge, belting, pulleys, tools, hose, one ten by ten Ingersoll Air Compressor; one Receiver; one 25 h. p. Fairbanks Morse gas engine and equipment; one seven by eight inch Dodge Crusher; three stopers; three jack hammers; one six h. p. Fairbanks hoist engine and cable; one two h. p. Fairbanks Morse engine; one Gibson Mill and equipment including concentrators and four amalgam plates.

situated upon the mining claims upon which said work and labor was performed near the north shore of Harriman Fjord, an inlet of Prince William Sound in Valdez Precinct, Territory of Alaska, known as and called;

CAMP BIRD No. 1, and

CAMP BIRD No. 2. [77]

About sixty-five ounces avoirdupois weight, of gold bullion extracted from the ore taken

from said mining claims subsequent to the commencement of the work and labor herein contracted for and which was brought to Valdez, Alaska, and placed in the First Bank of Valdez, Valdez, Alaska, said bullion being in form and shape circular and oval, retaining the form of the retort in which it was finally reduced; and all concentrates now on the above described mining ground;

and that the plaintiff's lien herein is hereby adjudged and decreed to extend, cover and include all and the total and full amount, extent and value of said gold bullion and concentrates wherever the same may now be located and also to said mill, machines and machinery.

7. That the said plaintiff may have judgment and execution against the said defendant for any deficiency which may remain after applying all the proceeds of the sale of said described property properly applicable to the satisfaction of said judgment.

Done at Valdez, Alaska, this 17th day of April, 1920.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 17, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. Entered Court Journal No. 12, page No. 668.

It is stipulated that Plaintiff's Exhibit "A," being the record in Civil Action No. 1029, be omitted from the record on appeal except the foregoing

decree, and that all other exhibits be omitted from the record on appeal.

Dated January 15, 1921.

E. E. RITCHIE,
Attorney for Plaintiff.

J. L. REED,
Attorney for Defendant. [78]

COPY.

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 4th day of January, 1920, and E. E. Ritchie appearing as counsel for plaintiff, and J. L. Reed appearing as counsel for defendant, the case was tried by the Court, whereupon documentary evidence was introduced on behalf of plaintiff and the evidence of witnesses for plaintiff, to wit: Wm. Quitsch and A. J. Dimond; and the evidence of the witnesses for the defendant, to wit: R. A. W.

Krampitz, Wm. Holland and J. H. D. Bouse; and the evidence of E. E. Ritchie for plaintiff in rebuttal, and no further evidence being offered, and the arguments of counsel heard and the Court being fully advised in the premises now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

I.

That on, prior and subsequent to the 19th day of March, 1920, said 19th day of March, 1920, being the time defendant herein filed and commenced an action for himself and certain other lien claimants to foreclose their liens against the personal property hereinafter described in these findings, plaintiff was a foreign corporation owning, leasing property and doing business within the Territory of Alaska; that at said times and prior to the 4th day of June, 1920, said plaintiff had wholly failed to comply with the provisions of Chapter 23 of the Compiled Laws of the Territory of Alaska, 1913, in the following particulars, that said plaintiff failed and neglected to file in the office of the Secretary of Alaska, and in the office of the clerk of the district court for the 3d division a duly authenticated copy of their charter or articles of incorporation and also a statement verified by the oath of the president and [79] secretary of said corporation and attested by the majority of the board of directors in accordance with the requirements of Section 654, and wholly failed and neglected during said times mentioned to file in said offices a certificate under the seal of the corporation, and the

signature of its president, vice-president, or other acting head, and its secretary certifying that the corporation has consented to be sued in the courts of the district upon all causes of action arising against it in the district, and that service of process may be made upon some person, a resident of the district, with the name and place of residence designated in such certificate and that such service when so made upon such agent, shall be valid service on the plaintiff corporation; and did wholly fail and neglect to appoint an agent residing at the principal place of business of said plaintiff or at all; that said plaintiff has wholly failed and neglected at said times to file in like manner the written consent of any person to act as such agent for plaintiff. That said plaintiff is a corporation duly organized under the laws of the State of Washington; that subsequent to the 4th day of June and before the commencement of this action plaintiff filed its articles of incorporation, appointment and consent of agent, and annual financial statement in the office of the secretary of the territory of Alaska and in the office of the clerk of the District Court, Third Division, at Valdez, and paid its annual license fee for the year 1920 to the territory.

II.

That plaintiff is now and has been continuously for several years last past the owner and subject to the rights of certain lessees hereinafter mentioned, entitled to the possession of two certain quartz mining claims situate adjacent to the north shore of Harriman fjord, Prince William Sound, Valdez

Precinct, Territory of Alaska, known as Camp Bird No. 1 and Camp Bird No. 2.

III.

That on or about May 1, 1918, plaintiff entered into a contract [80] in writing with J. E. Whalen and William Quitsch, whereby it leased to them said mining claims for a term of five years, ending October 25, 1922. At the time said lease was made said lessees were in possession thereof and continued in possession for a short time when they assigned, on the 3d day of June, 1918, the lease and all their rights thereunder to a corporation known as the Free Gold Mining Company and at said time said corporation entered into possession thereof. Said lease was filed for record in the office of the recorder of Valdez precinct May 31, 1918, and thereafter was duly recorded in Book 27, beginning at page 352.

IV.

That said lease provided that 12½ per cent of the gross output of gold and other metals taken by the lessees from the ground should be paid to the lessors upon receipt of returns of such metals from the United States assay office at Seattle, Washington.

V.

That said lease further provided that after July 1st, 1918, the lessees should keep at least six men steadily at work upon said mining claims, unless prevented by acts of God, labor strikes or other things over which they had no control, and that a cessation of work upon the mine for a period of

thirty days should work a forfeiture of the lease and in such case the property should immediately revert to the lessors. It was further stipulated in said lease that the lessees should at all times keep the premises free and clear of liens for labor or material furnished to the lessees.

VI.

That it was stipulated in said lease that all improvements, machinery, tools and other equipment placed on the property by the lessees during the term of the lease should remain upon the premises and become the property of the lessors at the expiration of the lease either by running of the term or by forfeiture as stipulated in its provisions.
[81]

VII.

That on the 25th day of June, 1919, while said Free Gold Mining Company was in possession of said mine and equipment as assignees of said lessees named in said lease and engaged in developing and operating said mine, plaintiff caused to be posted in three conspicuous places on the ground a notice in writing in words and figures following, to wit:

“NOTICE FOR NONLIABILITY FOR LABOR.

“Notice is hereby given that the Alaska Homestake Mining Company is the owner of the mining claims known as the Camp Bird No. 1 and Camp Bird No. 2, near Harriman Fjord, Valdez Precinct, Territory of Alaska; that said claims were leased to J. E. Whalen and William Quitsch by lease which appears of record in the office of the Com-

missioner and recorder of said Valdez precinct in Book 27 at pages 257-8-9-260, and supplemental lease to said lessees which appears of record in said recorder's office at pages 355-6-7-8-9-360 of Book 27; that said lease was assigned by said lessees to the Free Gold Mining Company, a corporation, by assignment which appears of record in said recorder's office on Book 27 at pages 364-5-6. Notice is further given that all work being done on said mining claims or to aid in their development or operation is done under and by virtue of said lease by the lessees or their assigns, and said Alaska Homestake Mining Company will not be responsible for any wages of employees engaged in any kind of work upon said claims or in aid of mining operations thereon.

“Dated and posted June —, 1919.

“ALASKA HOMESTAKE MINING CO.

“By E. E. RITCHIE.”

VIII.

That about January 8, 1920, said lessees and their assignee, Free Gold Mining Company, failed for more than thirty days thereafter to keep at least six men at work upon the mine, or any men at all, and failed to keep the said premises free and clear of labor liens. That said failure to keep men at work was not due to any act of God, labor strike, or other unavoidable circumstance, but was wholly the fault of the lessees and their assignee.

IX.

That on or about the 10th day of January, 1920, defendant and five other persons filed in the office

of the recorder of Valdez precinct, claims of lien upon certain machinery, tools and other equipment on said premises, and upon certain gold amalgam taken from [82] said mine, all more fully described hereinafter. All of said claims of lien were for wages of labor expressly stated to have been performed subsequent to the posting of the notice by plaintiff on June 25, 1919, set forth in the seventh finding of fact.

X.

That on the 19th day of March, 1920, defendant for himself and as assignee of the five other claimants, filed suit in this court to foreclose said liens upon the property described in them, and in his complaint made only the Free Gold Mining Company defendant. That this plaintiff was not made a party to the suit. Thereafter such proceedings were had in said action that judgment was rendered therein on the 17th day of April, 1920, against said Free Gold Mining Company and in favor of the plaintiff, defendant herein, for \$1,900.10 and \$383.-30 costs, and foreclosure of said liens, and directing sale of the property. Thereafter, acting under an order of sale issued out of the clerk's office of this court, the United States marshal of the Third Division of Alaska sold on May 1st, 1920, to defendant herein the following described personal property:

66oz. 6pwt. of GOLD RETORT:

and did sell on the 1st day of June, 1920, to defendant herein the following described personal property, to wit:

One seven foot Lane Mill; one 25 h. p. Foos engine; steel rails, cars, pipes, forge, beltings, pulleys, tools, hose, one ten by ten Ingersoll Air Compressor; one Receiver; one 25 h. p. Fairbanks Morse gas engine and equipment; one seven by eight inch Didge Crusher; three stopers; three jack hammers; one six h. p. Fairbanks hoist engine and cable; one two h. p. Fairbanks Morse engine; one Gibson Mill and equipment, including concentrators and three amalgam plates.

XI.

That no part or portion of the property sold to defendant described in the tenth finding herein was or is at the times mentioned on the surface of the ground and affixed thereto, so as to become fixtures and included within the terms "mine" or "mining claim" [83] as defined in Chapter 13 of the Session Laws of Alaska, 1915, or so as to become a part of the mining claims known as Camp Bird No. 1 and Camp Bird No. 2; that all of the same excepting said gold retort are within the definition and term "mill" or "machine" as defined in said session laws placed at the mine or on said mining claims and used in connection with the operation thereof the same not being fixtures and included in the term "mine." That said gold retort is within the third class of property defined in said session laws defined as dump or mass of mineral bearing sands, earth, ore, rock, etc.

XII.

That all of said property sold to defendant at

said *marshal's and* described in the tenth finding herein was and is at all the times mentioned and at the times when said labor was employed personal property. That all of said machinery and equipment was placed upon said mining claims by and belonged to and the ownership thereof was in the Free Gold Mining Company, save and except, one two-h. p. Fairbanks Morse engine; and one Gibson Mill and equipment; and that upon none of said property described in the tenth finding was notice posted or any claim of ownership made or given by the plaintiff herein in direct terms or otherwise than as could be inferred from said lease.

CONCLUSION OF LAW.

That by reason of the foregoing finding of facts that defendant's liens, equities, rights, and title under said judgment, decree and sales to each and all items of personal property as described in the tenth finding herein are superior and prior to any right or claim of plaintiff herein, and that defendant is entitled to have said action dismissed and to recover his costs herein.

Done in open court this 7th day of January, 1920.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 7, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

Entered Court Journal No. 13, page 79. [84]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Judgment.

This cause came on for hearing on the 4th day of January, 1921, and was heard upon the complaint, answer, reply, exhibits and proof in the cause and arguments of counsel and the cause was submitted to the Court for consideration and decision and after deliberation thereon and the Court having rendered its decision therein, makes and files its findings of fact and conclusions of law in writing:

It is ORDERED, ADJUDGED AND DECREED that plaintiff's action herein be and the same is hereby dismissed; that defendant have judgment against plaintiff for his costs and disbursements herein, taxed at \$24.90, for which execution will issue.

Dated at Valdez, Alaska, this 7 day of January, 1921.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 7, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy. Entered Court Journal No. 13, page No. 82. [85]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

**Plaintiff's Exceptions to Findings of Fact by the
Court.**

Now comes the plaintiff and excepts to the findings of fact made and entered by the Court herein as follows:

1.

Plaintiff excepts to the finding set forth as part of the first finding of fact, in the sixth and seventh lines thereof, that plaintiff was "doing business within the Territory of Alaska," on the ground that no testimony was offered to show that plaintiff was transacting any business in the Territory of Alaska other than exercising ordinary rights of ownership of two mining claims admitted to be owned by plaintiff.

2.

Plaintiff excepts to the finding contained in the 10th finding of fact that the following machinery and equipment are personal property, to wit:

1, 7 ft. Lane Mill; one 25 h. p. Foos engine; steel rails, cars, pipes, beltings, pulleys, one ten by ten Ingersoll Air Compressor; one Receiver; one 25 h. p. Fairbanks Morse gas engine and equipment; one seven by eight inch Dodge Crusher; one 6 h. p. Fairbanks hoist engine and cable; one Gibson Mill and equipment, including concentrators and three amalgam plates.

on the ground that said finding is contrary to the evidence.

3.

Plaintiff excepts to the finding contained in the 11th finding [86] of fact that none of the property described in the second exception was annexed to the ground for the reason that said finding is contrary to the evidence.

4.

Plaintiff excepts to all of said 11th finding of fact which in referring to the property described in the 10th finding of fact makes the following recital:

“That all of the same excepting said gold retort are within the definition and term ‘mill’ or ‘machine’ as defined in said session laws placed at the mine or on said mining claims and used in connection with the operation thereof the same not being fixtures and included in the term ‘mine.’ That said gold retort is

within the third class of property defined in said session laws defined as dump or mass of mineral bearing sands, earth, ore, rock, etc.”

on the ground that the said recitals are not findings of fact but conclusions of law, and are too indefinite to have legal effect, either as findings of fact or conclusions of law.

5.

Plaintiff excepts to the finding in the 12th finding of fact that all of the property described in said tenth finding of fact “was and is at all the times mentioned and at the times when said labor was employed personal property,” on the ground that the same is contrary to the evidence.

Plaintiff excepts to the finding in said 12th finding of fact: “That all of said machinery and equipment was placed upon said mining claims by and belonged to and the ownership thereof was in the Free Gold Mining Company, save and except one two h. p. Fairbanks Morse engine, and one Gibson Mill and Equipment,” upon the ground that said finding is misleading because it fails to recognize the reversionary right of plaintiff to all the property placed upon the ground by the Free Gold Mining Company, and further because said finding is irrelevant to the issues in the case.

Plaintiff excepts further to the finding contained in said [87] 12th finding of fact that “upon none of said property described in the tenth finding was notice posted or any claim of ownership made or given by the plaintiff herein, in direct terms or otherwise than as could be inferred from said

lease." For the reason that the undisputed evidence shows that notices were posted in three conspicuous places on the ground, one of them at the entrance to the mill building containing most of the machinery and equipment described.

E. E. RITCHIE,

Attorney for Plaintiff.

Service of copy admitted, this 11th day of January, 1921.

J. L. REED,

Atty. for Deft.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 11th, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy. [88]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Petition for Appeal.

The above-named plaintiff, conceiving itself aggrieved by the order and judgment made and entered on the 7th day of January, 1921, in the above-entitled cause, does hereby appeal from said or-

der and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the assignment of error, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco.

Dated January 11, 1921.

E. E. RITCHIE,
Attorney for Plaintiff.

The foregoing claim of appeal is allowed, January 11, 1921.

FRED M. BROWN,
Judge of District Court.

Entered Court Journal No. 13, page No. 89. [89]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 15, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff and Appellant,

vs.

R. A. W. KRAMPITZ,

Defendant and Respondent.

Assignment of Errors on Appeal.

Now comes the plaintiff, Alaska Homestake Mining Company, and says that in the record and proceedings of the court in the above-entitled cause, and in the final order and judgment therein made and entered on January 7, 1921, there is manifest error, and for error said plaintiff assigns the following:

1.

The Court erred in denying plaintiff's motion to strike the affirmative defense set up in defendant's answer.

2.

The Court erred in overruling plaintiff's objection to the following:

Mr. REED.—This was along in the fall of 1919, when Bill Quitsch was operating down there. I will ask you also in this connection, weren't there several papers drawn up in which efforts were made to get the men who went down there to work, to forego any claim of lien upon the property?

Mr. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception.

3.

The Court erred in overruling plaintiff's objection to the following question, the witness Quitsch being on the stand:

Q. And at one time did you present to him a waiver of lien on this property down there,

in case he went to work for the Free Gold Mining Company?

Mr. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception. [90]

4.

The Court erred in overruling plaintiff's objection to the following question, the witness Quitsch being on the stand:

Q. (By Mr. REED.) I will ask you this question—shortly prior to January 8th, in the compressor building, in your presence and in the presence of Nick Meckem and William Holland, did you hear Holland ask whether, in view of the notices that were posted their claims would be collectible, and you said, to these two men, well, the machinery is good for the labor, isn't it?

Mr. RITCHIE.—We object to that as irrelevant for the reason that no statement made by Mr. Quitsch could be binding on the Homestake Mining Company. It would be a matter of legal opinion, anyhow. He was manager of the Free Gold Mining Co., not of the Alaska Homestake.

The COURT.—I will overrule the objection, *pro forma*, and it will be considered in connection with the legal phase of the whole matter.

Plaintiff allowed an exception to the ruling.

* * * * *

Mr. RITCHIE.—We object to any conversa-

tion between these men, between Mr. Quitsch and these claimants, as to their rights.

By the COURT.—He may ask if he told them that, and it will be considered the same as the other question.

Plaintiff allowed an exception to the ruling.

5.

The Court erred in overruling plaintiff's objection to the following question:

Q. (By Mr. REED.) And is it not a fact that up to March 19th, which is the date that this suit was filed to foreclose those liens—did you not at a great many times between January 8th and March 19th, try to induce these men not to commence this suit, hoping to get the financial affairs of the Free Gold Mining Company straightened out?

Mr. RITCHIE.—We object to that as irrelevant and incompetent, first, because Mr. Quitsch was not representing the plaintiff in this case, the Alaska Homestake Mining Company. In the second place there was an automatic forfeiture on the 31st day after the Free Gold Company ceased work; and finally there is no lien given by the sweeping Alaska lien law on personal property except particular machinery such as dredges and mills.

Objection overruled, *pro forma*, and exception allowed.

6.

The Court erred in refusing to strike from the record certain questions propounded by the Court

to the witness Dimond and Mr. [91] Dimond's answers thereto, said questions being in part as follows:

Q. Do you know about the employment of these men whose liens are involved here—do you know of their original employment?

A. No; Mr. Quitsch was manager; he employed them.

Q. This paper that you drew up here, while it is not in the record—that was made on the part of the company, to get men to accept employment at that time and to take their pay on bedrock—take their pay out of the cleanups?

* * * * *

Q. Are any of these claimants in this case stockholders?

* * * * *

Mr. RITCHIE.—In order to keep the issues clear, I move to strike the questions propounded by the Court to Mr. Dimond and Mr. Dimond's answers thereto.

Motion denied; plaintiff allowed an exception.

7.

The Court erred in overruling plaintiff's objection to the following question propounded by Mr. Reed to the defendant Krampitz:

Q. Just describe the building in which it was placed—how about the side walls. Were they thick walls or just one boarded wall?

Mr. RITCHIE.—We object to that as the buildings are not in issue.

8.

The Court erred in overruling plaintiff's objection to the following propounded by Mr. Reed to the defendant Krampitz:

Q. Now, in regard to the conversation which occurred prior to January 8th in the concentrator-room, at which Mr. Quitsch was present and Nick Meckem was present—state what that conversation was?

Mr. RITCHIE.—We object to the conversation as incompetent and irrelevant and not binding on the Homestake Mining Company.

Q. And what Mr. Quitsch said about it?

The objection was overruled and plaintiff allowed an exception.

9.

The Court erred in overruling plaintiff's objection to the following question:

Q. (By Mr. REED to Defendant KRAM-PITZ.) Now, after your liens were [92] filed on January 10th did Mr. Quitsch have any conversation with you and the other lien claimants in regard to not bringing an action to foreclose your lien?

Mr. RITCHIE.—We object, as irrelevant and incompetent.

Objection overruled; plaintiff excepts.

10.

The Court erred in denying plaintiff's motion to strike the testimony of defendant Krampitz as follows:

Mr. RITCHIE.—I desire to move to strike all of the witness' testimony as to conversations with Mr. Quitsch about his wages.

Motion denied; plaintiff allowed an exception.

11.

The Court erred in denying plaintiff's motion to strike from the record the following questions by the Court and answers thereto, propounded to the witness, defendant Krampitz:

Q. You have talked to these men who assigned these claims to you, at the time they went to work and during the time they worked, about their claim? A. Yes, sir.

Q. And you say they went on the theory that the machinery was good for their wages?

A. That is what we thought, it ought to be, but I wasn't sure. Somebody made a remark about that notice posted up there and Mr. Quitsch said then, the machinery ought to be good for it, because that don't apply to this notice.

Q. You never went to look at the lease itself?

A. No.

Mr. RITCHIE.—At this time we move to strike from the record and the consideration of the Court the discussion just held by the Court with the witness as to his understanding and conversations.

Motion denied; plaintiff allowed an exception.

12.

The Court erred in overruling plaintiff's objec-

tion to the following questions propounded to the witness William Holland:

Q. (By Mr. REED.) I will ask you, before you went down there, was anything said to you at the time by Mr. Quitsch as to waiving your lien rights, was any paper presented to you?

A. Yes, sir.

Q. And did you sign it? A. No, sir.

Mr. RITCHIE.—All these questions go in under my objection. [93]

Objection overruled and exception allowed.

13.

The Court erred in overruling plaintiff's objections to questions propounded to the witness Holland as to conversations with Mr. Quitsch, as follows:

Q. (By Mr. REED.) Now you had conversations with Mr. Quitsch after he came to Valdez.

A. Yes, sir. * * *

Q. State if you recall what he said about filing suits.

Mr. RITCHIE.—We object to any conversations between the witness and Mr. Quitsch after he quit work.

Objection overruled; plaintiff excepts.

14.

The Court erred in overruling plaintiff's objection to the following questions propounded to the witness Hollard by Mr. Reed.

Q. He (Quitsch) came to Valdez and then returned and after he returned what did he tell

you, what did he tell the boys in regard to their work?

Objected to as irrelevant.

Objection overruled; plaintiff excepts.

15.

The Court erred in overruling plaintiff's objection to the question propounded to the witness Bouse, deputy United States marshal, referring to a claim filed with the marshal upon the 12½% interest in the gold product from the mine, as follows:

Q. (By Mr. REED.) I will ask you, was there any affidavit or any other claim of interest filed in regard to any of the other property that was sold in this suit.

Mr. RITCHIE.—We object, on the ground that there is no foundation for it in the pleadings.

Objection overruled; plaintiff allowed an exception.

Q. Was there any other claim of interest, in regard to this machinery, by the Alaska Homestake Mining Company or anyone else prior to the sale on June first of the machinery?

A. No, sir.

Same objection. * * *

Mr. REED.—Mr. Bouse states that the Alaska Homestake Mining Company prior to this did not make any claim to their interest or title in this property.

Mr. RITCHIE.—And we move to strike that much of the record because there is nothing

contained in the pleadings that has any reference to it.

Motion denied and exception allowed. [94]

16.

The Court erred in making the finding of fact set forth in plaintiff's first exception to the findings, as follows:

Plaintiff excepts to the finding set forth as part of the first finding of fact, in the sixth and seventh lines thereof, that plaintiff was "doing business within the Territory of Alaska on the ground that no testimony was offered to show that plaintiff was transacting any business in the Territory of Alaska other than exercising ordinary rights of ownership of two mining claims admitted to be owned by plaintiff."

17.

The Court erred in making the finding of fact set forth in plaintiff's second exception to the findings, as follows:

Plaintiff excepts to the finding contained in the tenth finding of fact that the following machinery and equipment are personal property, to wit:

1, 7 ft. Lane Mill; 1-25 h. p. Foos engine; steel rails, cars, pipes, beltings, pulleys, one ten by ten Ingersoll Air Compressor; one Receiver; one 25 h. p. Fairbanks Morse gas engine and equipment; one 7 by 8 inch Dodge Crusher; one 6 h. p. Fairbanks hoist engine and cable; one Gibson Mill and equipment including concentrators and three amalgam plates;

on the ground that the said finding is contrary to the evidence.

18.

The Court erred in making the finding of fact set forth in plaintiff's third exception to the findings, as follows:

Plaintiff excepts to the finding contained in the 11th finding of fact that none of the property described in the second exception was annexed to the ground, for the reason that said finding is contrary to the evidence.

19.

The Court erred in making the finding of fact set forth in plaintiff's fourth exception to the findings, as follows:

Plaintiff excepts to all of said 11th finding of fact which in referring to the property described in the 10th finding of fact makes the following recital:

“That all of the same excepting said gold retort are within the definition and term ‘mill’ or ‘machine’ as defined in said session laws placed at the mine or on said mining claims and used in connection with the operation thereof, the same not being fixtures and included in the term ‘mine.’ That said gold retort is within the third [95] class of property defined in said session laws defined as dump or mass of mineral bearing sands, earth, ore rock, etc.”

On the ground that the said recitals are not findings of fact but conclusions of law, and are too indefinite to have legal effect, either as findings of fact or conclusions of law.

20.

The Court erred in making the finding of fact set forth in plaintiff's fifth exception to the findings, as follows:

Plaintiff excepts to the finding in the 12th finding of fact that all of the property described in said tenth finding of fact "was and is at all the times mentioned and at the times when said labor was employed personal property" on the ground that the same is contrary to the evidence.

Plaintiff excepts to the finding in said 12th finding of fact, "That all of said machinery and equipment was placed upon said mining claims by and belonged to and the ownership thereof was in the Free Gold Mining Company, save and except, 1 #2 h. p. Fairbanks Morse engine, and one Gibson Mill and Equipment," upon the ground that said finding is misleading because it fails to recognize the reversionary right of plaintiff to all the property placed upon the ground by the Free Gold Mining Company, and further because said finding is irrelevant to the issues in the case.

Plaintiff excepts further to the finding contained in said 12th finding of fact that "upon none of said property described in the tenth finding was notice posted or any claim of ownership made or given by the plaintiff herein, in direct terms or otherwise than as could be inferred from said lease." For the reason that the undisputed evidence shows that notices

were posted in three conspicuous places on the ground, one of them at the entrance to the mill building containing most of the machinery and equipment described.”

21.

The Court erred in making its conclusion of law upon the findings of fact, as follows:

That by reason of the foregoing findings of facts that defendant's liens, equities, rights, and title under said judgment, decree and sales to each and all items of personal property as described in the tenth finding herein are superior and prior to any right or claim of plaintiff herein, and that defendant is entitled to have said action dismissed and to recover his costs herein.

22.

The Court erred in entering judgment against the plaintiff and in favor of the defendant. [96]

WHEREFORE plaintiff as appellant prays that said judgment be reversed.

E. E. RITCHIE,

Attorney for Plaintiff and Appellant.

Service by delivery of copy admitted this 15th day of January, 1921.

J. L. REED,

Attorney for Plaintiff and Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 15, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy. [97]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff,

vs.

R. A. W. KRAMPITZ,

Defendant.

Order Granting Injunction Pendente Lite.

Now, on this 13th day of January, 1921, this cause came on to be heard upon the motion of E. E. Ritchie, attorney for the plaintiff for an order granting plaintiff an injunction, enjoining and restraining defendant from proceeding to execution upon his judgment recovered in civil action No. 1029 in this court, during the pendency of plaintiff's appeal from the order and judgment of this court, made and entered in this cause on January 7, 1921, refusing plaintiff's application for an injunction herein and dismissing said cause upon the merits.

Plaintiff appeared by its attorney, E. E. Ritchie, and defendant by his attorney, J. L. Reed.

It appearing that plaintiff is entitled to such interlocutory injunction *pendente lite*, IT IS ORDERED, that the same be granted, upon the execution by plaintiff of a bond in the sum of One Thousand Dollars, with sufficient sureties, conditioned upon the payment of all damages that may result to

defendant by reason of the issuance of the injunction, in the event that judgment shall finally be affirmed.

It is further ORDERED that the bond for costs on appeal to be given by plaintiff be fixed at Two Hundred and Fifty Dollars.

Dated January 13, 1921.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 13, 1921. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.

Entered Court Journal No. 13, page No. 88.

[98]

Filed in the District Court, Territory of Alaska, Third Division. Jan. 14, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Pltff. and Appellant,

vs.

R. A. W. KRAMPITZ,

Deft. and Respondent.

Bond on Injunction Pendente Lite.

KNOW ALL MEN BY THESE PRESENTS, That we, Alaska Homestake Mining Company, as principal, and A. M. Dieringer and W. N. Cuddy, both of Valdez, Alaska, as sureties, are held and firmly bound unto the above named R. A. W. Krampitz, in the sum of One Thousand Dollars, to be paid to the said R. A. W. Krampitz, his heirs, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our successors, heirs, executors, administrators and assigns, jointly and severally, by these presents.

Dated this 13th day of January, 1921.

WHEREAS, The above-named plaintiff and appellant has sued out an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse a judgment rendered against it in the above-entitled action, in the District Court for the Territory of Alaska, Third Division, which judgment was so rendered and entered by said Court on the 7th day of January, 1921:

Now, therefore, if the above-named Alaska Homestake Mining Company shall prosecute said appeal to effect and shall answer all costs and damages if it should fail to make its plea good, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the said Alaska Homestake Mining Company has caused this undertaking to be signed by its attorney of record [99] and the

sureties named herein have hereunto set their hands this 13th day of January, 1921.

ALASKA HOMESTAKE MINING COMPANY,

By E. E. RITCHIE,

Its Attorney.

A. M. DIERINGER,

W. N. CUDDY.

United States of America,
Territory of Alaska,—ss.

A. M. Dieringer and W. N. Cuddy, being duly sworn, each for himself, says: That he is one of the sureties who signed the foregoing bond; that he is not an attorney or counselor at law, marshal, clerk of any court or other officer of any court, and that he is worth the sum of One Thousand Dollars, named as the penal sum in said bond, over and above his just debts and liabilities and exclusive of property exempt by law from execution.

A. M. DIERINGER.

W. N. CUDDY.

Subscribed and sworn to before me, this 13th day of January, 1921.

[Seal]

I. HAMBURGER,

Notary Public for Alaska.

Commission expires Oct. 31, 1921.

The foregoing bond was acknowledged before me and by me approved this 13th day of January, 1921.

FRED M. BROWN,

District Judge. [100]

Filed in the District Court, Territory of Alaska,
Third Division. Jan. 14, 1921. Arthur Lang,
Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Pltff. and Appellant,

vs.

R. A. W. KRAMPITZ,

Deflt. and Respondent.

Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That we, Alaska Homestake Mining Company, as
principal, and A. M. Dieringer and W. N. Cuddy,
both of Valdez, Alaska, as sureties, are held and
firmly bound unto the above-named R. A. W. Kram-
pitz in the sum of Two Hundred and Fifty Dollars,
to be paid to the said R. A. W. Krampitz, his heirs,
executors, administrators or assigns, to which pay-
ment well and truly to be made we bind ourselves,
our successors, heirs, executors, administrators and
assigns, jointly and severally, by these presents.

Dated this 13th day of January, 1921.

WHEREAS, The above-named plaintiff and
appellant has sued out an appeal to the United
States Circuit Court of Appeals for the Ninth Judi-
cial Circuit, to reverse a judgment rendered against

it in the above-entitled action, in the District Court for the Territory of Alaska, Third Division, which judgment was so rendered and entered by said Court on the 7th day of January, 1921, dismissing plaintiff's action and for costs against it:

Now, therefore, the condition of the above obligation is such that if the above-named Alaska Homestake Mining Company shall prosecute said appeal to effect and shall answer all costs, if it should fail to make its plea good, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the said Alaska Homestake Mining Company [101] has caused this undertaking to be signed by its attorney of record and the sureties named herein have hereunto set their hands this 13th day of January, 1921.

ALASKA HOMESTAKE MINING COMPANY,

By E. E. RITCHIE,

Its Attorney.

A. M. DIERINGER,

W. N. CUDDY.

United States of America,
Territory of Alaska,—ss.

A. M. Dieringer and W. N. Cuddy, being duly sworn, each for himself, says: That he is one of the sureties who signed the foregoing bond; that he is not an attorney or counselor at law, marshal, clerk of any court or other officer of any court, and that he is worth the sum of Two Hundred and Fifty Dollars, named as the penal sum in said bond, over

and above his just debts and liabilities and exclusive of property exempt by law from execution.

A. M. DIERINGER.

W. N. CUDDY.

Subscribed and sworn to before me this 13th day of January, 1921.

[Seal]

I. HAMBURGER,

Notary Public in and for Alaska.

Commission expires Oct. 31, 1921.

The foregoing bond was acknowledged before me and by me approved this 13th day of January, 1921.

FRED M. BROWN,

District Judge. [102]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Pltff. and Appellant,

vs.

R. A. W. KRAMPITZ,

Def't. and Respondent.

**Order Settling and Certifying Bill of Exceptions on
Appeal.**

It appearing that the foregoing bill of exceptions on appeal is approved by counsel for the parties respectively, and that the same conforms to the truth and is in proper form:

IT IS ORDERED that said bill of exceptions is hereby approved, allowed and settled, and ordered to be filed and made part of the record in this cause.

Done in open court this 15th day of January, 1921.

FRED M. BROWN,

Judge of the District Court of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Jan. 15, 1921. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

Entered Court Journal No. 13, page No. 89. [103]

Filed in the District Court, Territory of Alaska, Third Division. Jan. 15, 1921. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,

Plaintiff and Appellant,

vs.

R. A. W. KRAMPITZ,

Defendant and Respondent.

Citation on Appeal.

United States of America,—ss.

To R. A. W. Krampitz, GREETING:

WHEREAS, The Alaska Homestake Mining Com-

pany has appealed to the Circuit Court of Appeals of the Ninth Circuit from a judgment recently rendered in the District Court of Alaska, Third Division, in favor of you, the said R. A. W. Krampitz, and has filed the security required by law: You are therefore cited to appear before the said Circuit Court of Appeals of the Ninth Circuit, in the City of San Francisco, State of California, on the 14th day of February, 1921, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at Valdez, in said Third Division of Alaska, this 15th day of January, 1921.

FRED M. BROWN,
Judge of the District Court of the Territory of
Alaska, Third Division.

Service of the foregoing Citation by receiving a true copy thereof is accepted this 13th day of January, 1921.

J. L. REED,
Attorney for Deft. and Respondent. [104]

In the District Court for the Territory of Alaska,
Third Division.

No. 1060.

ALASKA HOMESTAKE MINING COMPANY,
.. Plaintiff,

vs.

R. A. W. KRAMPITZ.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the annexed and foregoing 104 pages, numbered from 1 to 104, inclusive, are a true, full and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with a praecipe filed in above cause by E. E. Ritchie, attorney for the plaintiff in said cause.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$26.40, was paid to me by E. E. Ritchie, attorney for plaintiff and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 15th day of January, 1921.

[Seal]

ARTHUR LANG,

Clerk of the District Court for the Territory of
Alaska, Third Division.

By C. H. Wilcox,
Deputy. [105]

[Endorsed]: No. 3641. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Homestake Mining Company, a Corporation, Appellant, vs. R. A. W. Krampitz, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed February 1, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA HOMESTAKE MINING COMPANY, a
Corporation
Appellant,

vs.

No.

R. A. W. KRAMPITZ,
Appellee.

**APPEAL FROM THE DISTRICT COURT FOR THE TER-
RITORY OF ALASKA, THIRD DIVISION**

BRIEF FOR APPELLANTS

FILED
APR 14 1911
F. D. MONROE
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit

ALASKA HOMESTAKE MINING COMPANY, a
Corporation
Appellant,

vs. *No.*

R. A. W. KRAMPITZ,
Appellee.

**APPEAL FROM THE DISTRICT COURT FOR THE TER-
RITORY OF ALASKA, THIRD DIVISION**

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

Appellant owns a mine on two mining claims in Valdez precinct, Territory of Alaska, Third Division. In May, 1918, it made a lease of this mine to two men, supplementing a previous one made the preceding October. The new lease was stipulated to expire in October, 1922. By its terms the lessees were to operate the mine under the usual provisions of such leases and were to pay a royalty of 12½ per cent gross on all mineral production. The entire mineral output was

stipulated to be delivered to the First Bank of Valdez, which was to have the same reduced and when the proceeds were received was to place $87\frac{1}{2}$ per cent to the credit of the lessees and $12\frac{1}{2}$ per cent to the credit of the lessor. It was further stipulated that all machinery, tools and equipment of every kind placed upon the ground was to remain there and upon the determination of the lease either by expiration of the term or by forfeiture, was to become the property of the lessor. Provision was made for working the mine steadily, with a stipulation that if the lessees failed for thirty days to work the mine, except under certain saving conditions, the lease should thereupon forfeit automatically. Soon after the lease was executed it was assigned to the Free Gold Mining Company, a corporation, which operated the mine until about January 8, 1920. For several months previous to that date defendant and other miners had been employed by the Free Gold Company. Before any of them began work at the mine, the appellant, owner of the ground and reversionary owner of the machinery, tools and other equipment, posted a notice in three places about the mine, in form required by the lien law of the territory, stating that it would not be liable for wages of employes of the Free Gold Company. This notice referred to the record of the lease in the office of the recorder of the precinct, giving book and page, as required by the law. (R. 27.) Soon after they stopped work the men filed liens against the machinery and equipment and the last production, about 66 ounces of gold amalgam.

Thereafter, on March 19, 1920, defendant, for himself and as assignee of the other lien claimants, filed suit in the district court of Alaska to foreclose the liens, making the Free Gold Mining Company sole defendant. Default judgment was entered and in due course the property upon which the liens were claimed was sold and was bought by the plaintiff in that suit, defendant herein. By that sale he became the purported owner of practically all the machinery and equipment and all the gold amalgam.

Thereafter plaintiff filed suit to have the judgment in the lien foreclosure set aside so far as it affected plaintiff's alleged property rights; to-wit: The reversionary interest in all machinery, tools and equipment on the ground, taking effect at the termination of the lease as provided by its terms, and the royalty of $12\frac{1}{2}$ per cent of the gold amalgam. The court ordered the case re-opened for determination of plaintiff's rights, and after a hearing ordered the suit dismissed. From that order and judgment plaintiff prosecutes this appeal.

ASSIGNMENTS OF ERROR

1.

The Court erred in denying plaintiff's motion to strike the affirmative defenses set up in defendant's answer.

2.

The Court erred in overruling plaintiff's objection to the following:

MR. REED.—This was along in the fall of 1919, when Bill Quitsch was operating down there. I will ask you also in this connection, weren't there several papers drawn up in which efforts were made to get the men who went down there to work, to forego any claims of lien upon the property?

MR. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception.

3.

The Court erred in overruling plaintiff's objection to the following question, the witness Quitsch being on the stand:

Q. And at one time did you present to him a waiver of lien on this property down there, in case he went to work for the Free Gold Mining Company?

MR. RITCHIE.—We object to that as irrelevant.

Objection overruled; plaintiff allowed an exception.

4.

The Court erred in overruling plaintiff's objection to the following question, the witness Quitsch being on the stand:

Q. (By Mr. REED.)—I will ask you this question—shortly prior to January 8th, in the compressor building, in your presence and in the presence of Nick Meckem and William Holland, did you hear Holland ask whether in view of the no-

tices that were posted on their claims would be collectible, and you said, to these two men, well, the machinery is good for the labor, isn't it?

Mr. RITCHIE.—We object to that as irrelevant for the reason that no statement made by Mr. Quitsch could be binding on the Homestake Mining Company. It would be a matter of legal opinion anyhow. He was manager of the Free Gold Mining Co., not of the Alaska Homestake.

The COURT.—I will overrule the objection, pro forma, and it will be considered in connection with the legal phase of the whole matter.

Plaintiff allowed an exception to the ruling.

Mr. RITCHIE.—We object to any conversation between these men, between Mr. Quitsch and these claimants, as to their rights.

By the COURT.—He may ask if he told them that, and it will be considered the same as the other question.

Plaintiff allowed an exception to the ruling.

5.

The Court erred in overruling plaintiff's objection to the following question:

Q. (By Mr. REED.)—And is it not a fact that up to March 19th, which is the date that this suit was filed to foreclose those liens—did you not at a great many times between January 8th and March 19th, try to induce these men not to commence this suit, hoping to get the financial affairs of the Free Gold Mining Company straightened out?

Mr. RITCHIE.—We object to that as irrelevant and incompetent; first, because Mr. Quitsch was not representing the plaintiff in this case, the

Alaska Homestake Mining Company. In the second place there was an automatic forfeiture on the 31st day after the Free Gold Company ceased work; and finally there is no lien given by the sweeping Alaska lien law on personal property except particular machinery such as dredges and mills.

Objection overruled, pro forma, and exception allowed.

6.

The Court erred in refusing to strike from the record certain questions propounded by the Court to the witness Dimond and Mr. Dimond's answers, said questions being in part as follows:

Q. Do you know about the employment of these men whose liens are involved here—do you know of their original employment?

A. No, Mr. Quitsch was manager; he employed them.

Q. This paper that you drew up here, while it is not in the record—that was made on the part of the company, to get men to accept employment at that time and to take their pay on bedrock—take their pay out of the cleanups?

* * * * *

Q. Are any of these claimants in this case stockholders?

* * * *

Mr. RITCHIE.—In order to keep the issue clear, I move to strike the questions propounded by the Court to Mr. Dimond and Mr. Dimond's answers thereto. *

Motion denied; plaintiff allowed an exception.

The Court erred in overruling plaintiff's objection to the following question propounded by Mr. Reed to the defendant KRAMPITZ:

Q. Just describe the building in which it was placed—how about the side walls? Were they thick walls or just one boarded wall?

Mr. RITCHIE.—We object to that as the buildings are not in issue.

The Court erred in overruling plaintiff's objection to the following propounded by Mr. Reed to the defendant KRAMPITZ:

Q. Now in regard to the conversation which occurred prior to January 8th in the concentrator room, at which Mr. Quitsch was present and Nick Meckem was present—state what that conversation was?

Mr. RITCHIE.—We object to the conversation as incompetent and irrelevant and not binding on the Homestake Mining Company.

Q. And what Mr. Quitsch said about it?

The objection was overruled and plaintiff allowed an exception.

The Court erred in overruling plaintiff's objection to the following question:

Q. (By Mr. REED, to Defendant KRAM-PITZ.)—Now after your liens were filed on January 10th, did Mr. Quitsch have any conversation with you and the other lien claimants in re-

gard to not bringing an action to foreclose your lien?

Mr. RITCHIE.—We object, as irrelevant and incompetent.

Objection overruled; plaintiff excepts.

10.

The Court erred in denying plaintiff's motion to strike the testimony of defendant KRAMPITZ as follows:

Mr. RITCHIE.—I desire to move to strike all of the witness's testimony as to conversations with Mr. Quitsch about his wages.

Motion denied; plaintiff allowed an exception.

11.

The Court erred in denying plaintiff's motion to strike from the record the following questions by the Court, and answers thereto, propounded to the witness, defendant KRAMPITZ:

Q. You have talked to these men who assigned these claims to you, at the time they went to work and during the time they worked, about their claim?

A. Yes, sir.

Q. And you say they went on the theory that the machinery was good for their wages?

A. That is what we thought, it ought to be, but I wasn't sure. Somebody made a remark about that notice posted up there and Mr. Quitsch said then, the machinery ought to be good for it because that don't apply to this notice.

Q. You never went to look at the lease itself?

A. No.

Mr. RITCHIE.—At this time we move to strike from the record and the consideration of the Court the discussion just held by the Court with the witness as to his understanding and conversations.

Motion denied; plaintiff allowed an exception.

12.

The Court erred in overruling plaintiff's objection to the following questions propounded to the witness William Holland:

Q. (By Mr. REED.)—I will ask you, before you went down there, was anything said to you at the time by Mr. Quitsch as to waiving your lien rights, was any paper presented to you?

A. Yes, sir.

Q. And did you sign it?

A. No, sir.

Mr. RITCHIE.—All these questions go in under my objection.

Objection overruled and exception allowed.

13.

The Court erred in overruling plaintiff's objections to questions propounded to the witness Holland as to conversations with Mr. Quitsch, as follows:

Q. (By Mr. REED.)—Now you had conversations with Mr. Quitsch after he came to Valdez?

A. Yes, sir.

Q. State if you recall what he said about filing suits?

Mr. RITCHIE.—We object to any conversations between the witness and Mr. Quitsch after he quit work.

Objection overruled; plaintiff excepts.

14.

The Court erred in overruling plaintiff's objection to the following questions propounded to the witness Holland by Mr. Reed:

Q. He (Quitsch) came to Valdez and then returned and after he returned what did he tell you, what did he tell the boys in regard to their work?

Objected to as irrelevant.

Objection overruled; plaintiff excepts.

15.

The Court erred in overruling plaintiff's objection to the question propounded to the witness Bouse, deputy United States marshal, referring to a claim filed with the marshal upon the 12½% interest in the gold product from the mine, as follows:

Q. (By Mr. REED.)—I will ask you, was there any affidavit or any other claim of interest filed in regard to any of the other property that was sold in this suit?

Mr. RITCHIE.—We object, on the ground that there is no foundation for it in the pleadings.

Objection overruled; plaintiff allowed an exception.

Q. Was there any other claim of interest, in regard to this machinery, by the Alaska Homestake Mining Company or any one else prior to the sale on June first of the machinery?

A. No, sir.

Same objection. * * * * *

Mr. REED.—Mr. Bouse states that the Alaska Homestake Mining Company prior to this did not

make any claim to their interest or title in this property.

Mr. RITCHIE.—And we move to strike that much of the record because there is nothing contained in the pleadings that has any reference to it.

Motion denied and exception allowed.

16.

The Court erred in making the Finding of Fact set forth in plaintiff's first exception to the Findings, as follows:

Plaintiff excepts to the finding set forth as part of the first finding of fact, in the sixth and seventh lines thereof, that plaintiff was "doing business within the Territory of Alaska," on the ground that no testimony was offered to show that plaintiff was transacting any business in the Territory of Alaska other than exercising ordinary rights of ownership of two mining claims admitted to be owned by plaintiff.

17.

The Court erred in making the Finding of Fact set forth in plaintiff's second exception to the Findings, as follows:

Plaintiff excepts to the finding contained in the tenth finding of fact that the following machinery and equipment are personal property, to-wit:

1 7 ft. Lane Mill, 1 25 h. p. Foos engine; steel rails, cars, pipes, beltings, pulleys, one ten by ten Ingersoll Air Compressor; one Receiver; one 25 h. p. Fairbanks-Morse gas engine and equipment; one 7 by 8 inch Dodge Crusher; one 6 h. p. Fairbanks hoist engine and cable, one Gibson Mill and

equipment, including concentrators and three amalgam plates

on the ground that the said finding is contrary to the evidence.

18.

The Court erred in making the Finding of Fact set forth in plaintiff's third exception to the Findings, as follows:

Plaintiff excepts to the finding contained in the 11th finding of fact that none of the property described in the second exception was annexed to the ground, for the reason that said finding is contrary to the evidence.

19.

The Court erred in making the Finding of Fact set forth in plaintiff's fourth exception to the Findings, as follows:

Plaintiff excepts to all of said 11th finding of fact which in referring to the property described in the 10th finding of fact makes the following recital:

"That all of the same excepting said gold retort are within the definition of the term 'mill' or 'machine' as defined in said session laws placed at the mine or on said mining claims and used in connection with the operation thereof, the same not being fixtures and included in the term 'mine.' That said gold retort is within the third class of property defined in said session laws defined as dump or mass of mineral bearing sands, earth, ore, rock, etc.

On the ground that the said recitals are not findings

of fact but conclusions of law, and are too indefinite to have legal effect, either as findings of fact or conclusions of law.

20.

The Court erred in making the Finding of Fact set forth in plaintiff's fifth exception to the Findings, as follows:

Plaintiff excepts to the finding in the 12th finding of fact that all of the property described in said tenth finding of fact "was and is at all the times mentioned and at the times when said labor was employed personal property" on the ground that the same is contrary to the evidence.

Plaintiff excepts to the finding in said 12th finding of fact "that all of said machinery and equipment was placed upon said mining claims by and belonged to and the ownership thereof was in the Free Gold Mining Company, save and except, one 2 h. p. Fairbanks-Morse engine, and one Gibson Mill and equipment" upon the ground that said finding is misleading because it fails to recognize the reversionary right of plaintiff to all the property placed upon the ground by the Free Gold Mining Company, and further because said finding is irrelevant to the issues in the case.

Plaintiff excepts further to the finding contained in said 12th finding of fact that "upon none of said property described in the tenth finding was notice posted or any claim of ownership made or given by the plaintiff herein, in direct terms or otherwise than as could be inferred from said lease" for the reason that the undisputed evidence shows that notices were posted in three conspicuous places on the ground, one of them

at the entrance to the mill building containing most of the machinery and equipment described.

21.

The Court erred in making its Conclusion of Law upon the Findings of Fact, as follows:

That by reason of the foregoing findings of facts that defendant's liens, equities, rights, and title under said judgment, decree and sale to each and all items of personal property described in the tenth Finding herein are superior to and prior to any right or claim of plaintiff herein, and that defendant is entitled to have said action dismissed and to recover his costs herein.

22.

The Court erred in entering judgment against the plaintiff and in favor of the defendant.

ARGUMENT

Inspection of the assignments of error will show that they are mainly to admissions of testimony objected to by plaintiff. Whether this testimony was an important factor in producing the judgment may be difficult to determine. The record shows that nearly all the testimony offered by defendant was objected to, and plaintiff urges here that practically all that testimony was incompetent and irrelevant, as well as all the evidence brought out by the trial judge, and should not have been brought to the attention of the Court at all.

Appellant contends that only one issue was before

the court—the legal effect of the notice posted on the ground by appellant notifying all persons interested that it would not be liable for wages of employes of the lessee, Free Gold Mining Company. The posting of the notice and its contents were undisputed in pleadings and evidence. Actual knowledge of the notice by the miners was also admitted. (R. 81.) The description and situation of the machinery and equipment were undisputed. Witness Quitsch described this property and defendant gave practically the same description.

Before taking up the assignments of error appellant wishes to direct the attention of the Court to the Alaska lien law, under which the liens in question were claimed and filed. The law is Chapter 13 of the Session Laws of Alaska, 1915. It is very long and with much detail seeks to cover every kind of mining work and to give a lien with few exceptions. One of these exceptions is involved in this case, providing for notice of non-liability by an owner of leased ground. Two sections of the law are to be read with the notice given in this case in order to determine its effect. They are the following:

Sec. 2. When two or more mining claims, lodes or deposits are contiguous and are owned or claimed by the same person or persons, and are worked through a common shaft, pit, tunnel, incline or other opening, or over one tram, or at one mill or reduction works, then all mining claims, lodes or deposits, so owned, claimed and worked, and all roads, trams, tramways, ditches, flumes, pipe lines, buildings, structures, super-

structures and machinery which is a fixture thereto, thereon and used in connection with the working thereof, shall, for the purposes of this act, be considered one mine.

Sec. 3. All work and labor performed in, on or upon a mine or mining claim at the instance of any person in privity with, or having the right of possession, or privilege of working or mining thereon from the owner or his authorized agent, in prospecting, opening up, developing, mining, or in doing any other class of work necessary or convenient to the opening up, development or mining of such mine or mining claim, or the separation or reduction to a commercial value of the minerals therein, thereon, or extracted therefrom, shall be deemed to have been done at the instance of the owner of the mine or mining claims, and such owner's interests therein shall be subject to any lien filed in accordance with the provisions of this act, unless such owner shall, within ten days after he shall have obtained knowledge of such work or labor being performed, give notice that he will not be responsible for the same, by posting notices in writing to that effect, in three conspicuous places on such mine or mining claim; and should said mine or mining claim be worked or mined by a lessee under a written lease or lay, or under a bond or contract of sale from the owner or executed by his authority, such lease, bond or contract must be recorded in the precinct records of the precinct wherein the mine or mining claim is situated, and the notice of non-liability aforesaid shall refer to the record of such recorded instrument. All work and labor done on, in and about a dredge, steam shovel, mill or ma-

chine, used in mining and on account of which the same is subject to a lien under the provisions of this act, at the instance of any person having the right of possession or right of use thereof from the owner thereof, shall be deemed to have been done at the instance of the owner of said dredge, steam shovel, mill or machine, and the interest of such owner therein shall be subject to the lien provided for herein, unless such owner shall within ten days after he shall have obtained knowledge of such use give notice of his interest therein, and that he will not be responsible for the work and labor involved in such use by posting a notice in writing to that effect in a conspicuous place on such dredge, steam shovel, mill or machine.

It was admitted, and was stated in the findings of fact made by the Court (R. 105-107), that before any of the men whose liens were claimed in the foreclosure suit began work the following notice was posted in three conspicuous places on the ground, to-wit:

“Notice is hereby given that the Alaska Homestake Mining Company is the owner of the mining claims known as the Camp Bird No. 1 and Camp Bird No. 2, near Harriman Fjord, Valdez Precinct, Territory of Alaska; that said claims were leased to J. E. Whalen and William Quitsch by lease which appears of record in the office of the commissioner and recorder of said Valdez precinct in Book 27 at pages 257-8-9-260, and supplemental lease which appears of record in said recorder’s office at pages 355-6-7-8-9-360 of said Book 27; that said lease was assigned by said lessees to the Free Gold Mining Company, a corpo-

ration, by assignment which appears of record in said recorder's office in Book 27 at pages 364-5-6. Notice is further given that all work being done on said mining claims or to aid in their development or operation is done under and by virtue of said lease by the lessees or their assigns, and said Alaska Homestake Mining Company will not be responsible for any wages of employes engaged in any kind of work upon said claims or in aid of mining operations thereon."

Plaintiff reiterates that the sole issue to be determined is the legal effect of this notice read in the light of the sections of the law just quoted, and the provisions of the lease which appear in this record, beginning on page 10. Section 2 of the law provides that when mining property is held under one ownership it shall, with all improvements and fixtures, constitute one mine. Section 5 provides that the owner of a leased mine may protect himself against liability for wage debts of his lessee by posting notices on the ground.

It was contended by defendant, as shown by his pleadings, that the notice protected only the mining claims. If this is true then section 2, plainly designed to make the miner's lien co-extensive with the mining property, only operates in favor of the lien claimant, and a description sufficient to carry a lien is insufficient to support a notice of non-liability. Plaintiff submits that no such construction is logical or reasonable. The object of the section seems to have been to simplify descriptions. The legislature enacted a law giving miners a lien upon mining ground with all ap-

purtenances and improvements. It provided that all should be regarded as a single property, precisely as a deed of a city lot carries with it all buildings unless excepted. A deed of these mining claims would have conveyed everything annexed to the land. Why should it be necessary to give a more detailed description of property in a notice of non-liability than in a notice of lien?

Proof that only the generic description of the mine or mining claims is necessary in such a notice may be found in section 5 of the act, already quoted. It requires that the lease be of record and that the notice refer to that record. By consulting that record any person interested can find the exact rights of lessor and lessee in the property.

Defendant contended in his answer that all the machinery on the mining claims was personal property and that to protect it against liability for labor it was necessary for the owner to post a notice on each and every chattel. (R. 34.) At least that is the only logical deduction that can be made in view of defendant's denial that posting three notices on the ground exempted anything else, regardless of its situation or character.

The Oregon supreme court has passed adversely upon all of defendant's claims in construing a lien law very similar to the Alaska law. Some parts of the Oregon law (Sec. 5668 B. and C. Code) read almost word for word with parts of the Alaska law. As the Oregon law was prior in time it is a fair presumption that the Alaska law was modeled in part upon the for-

mer. The Oregon law, like the Alaska law, provides that all mining properties owned and worked together shall constitute one mine. It provides further:

“That this section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, mill or millsite, when the same shall be worked by a lessee or lessees, provided, a lessor of any such mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, mill site, or mill, shall have recorded in the mining records of the county wherein any such mine is located a copy of any such lease before the work shall have begun on any such property.”

Construing this last section the Oregon supreme court in *Lewis. vs. Beeman*, 80 P. 417, held that under it “no lien can be enforced against mining property for labor performed where the lease was recorded before the work was begun.” Citing *Stinson vs. Hardy*, 27 Or. 584, 41 P. 116.

The Alaska law gives more notice to the miner than the Oregon law. The latter merely requires the lease to be recorded and it becomes at once constructive notice. The Alaska law requires the lease to be recorded and further requires three notices of the owner's claim to be posted in conspicuous places on the ground and the notices must refer to the record. Of what use is the reference to the record in the notice if not to inform the miner how he can ascertain what property he has a lien upon? In *Stinson vs. Hardy*, *supra*, the court said:

“By the act it is declared that the lien shall not

be deemed to apply to the owner or owners when the same shall be worked by a lessee or lessees. The spirit of the act would seem to imply that when the mine is worked by some person other than the owner, who himself has an interest independent of such owner, and absolutely independent of his supervision and control, a lien claimed for work performed or materials furnished the person having such interest should not apply as against the owner or owners of the mine, and hence the lien claimed in the case at bar cannot affect the reversionary interest of the owners of these mines."

The Oregon supreme court also disposed under the same law of the contention that in describing a mine it is necessary to describe artificial attachments separately. This was in *Washburn vs. Inter-Mountain Mining Co.*, 109 P. 382. Referring to the provision that "roads, tramways, trails, flumes, ditches or pipe lines, buildings, structures, etc., shall for the purposes of this act be deemed one mine, the court said:

The reference, in this language to 'roads, tramways, flumes, ditches or pipe lines,' etc., includes such appurtenances when not situated upon the mine, as those upon the mine are part of the realty and need not be specifically mentioned. And so the use of the term 'upon any millsite or mill used, owned or operated in connection with such mine,' in section 5668, prior to the amendment of 1907, had reference to such millsite and mill not situated upon the mine, as is further shown by the subsequent language of that section. Therefore, the section as amended necessarily includes the millsite

and mill situated upon the mine without being specially named.

This brief has already referred to the similarity of language in certain sections of the Oregon and Alaska laws in providing that improvements and appurtenances shall with the land constitute one mine. Plaintiff at this point directs attention to section 13 of the Alaska law, which provides that the term mine in a lien notice includes contiguous mining claims and all improvements, appurtenances and machinery, describing such appurtenances at great length, and then proceeds:

“And the term ‘mining claim’ shall be construed to mean any parcel of land containing minerals, which has been acquired, or possessed or held under the mining laws of the United States, together with all deposits, veins or lodes contained therein; and all machinery, structures or superstructures beneath the surface of the ground; and all shafts, tunnels and openings sunk or driven thereon; and all machinery, structures and superstructures on the surface and affixed thereto.”

Taking up the assignments of error, and temporarily passing over the first, plaintiff directs attention briefly to assignments 2 to 15, inclusive. All these raise questions of inadmissibility of testimony. Plaintiff submits that all the testimony objected to was wholly incompetent and irrelevant. Defendant was allowed to introduce testimony as to “understandings” and conversations between Quitsch, manager for the Free Gold Company, and the lien claimants, both before and after they had ceased to work. It was not

pleaded by defendant that Quitsch represented the Alaska Homestake Company (appellant), nor was any offer made to prove that he did. Clearly, agreements made between Quitsch and the men, under the pleadings and admitted facts, were incompetent and irrelevant for any purpose. It was not even claimed that anyone representing the Alaska Homestake was present at any of these conversations.

The 17th assignment of error attacks the finding of fact that the machinery and equipment sold under plaintiff's judgment is personal property, and the 18th the finding that none of said property was annexed to the land. William Quitsch testified that the Lane mill, the Foos gas engine, the Fairbanks-Morse engine, the Ingersoll air compressor, and Dodge crusher were set on heavy timbers, banked in the gravel and bolted to the timbers. The hoist was inside the mine. The steel rails were laid in the tunnel for a track and so used. (R. 54-5-6-7-8-9.) This testimony was not contradicted. Answering a question by the Court Quitsch said:

Q. Was the intention in putting in this mill and the other machinery there that it was to remain there permanently as working machinery for the mine?

A. Yes, that was the intention. I had nothing to do with the management of the company at that time.

By Mr. RITCHIE.—You have read the lease and you understand thoroughly that it provides that everything put on by the Free Gold Mining Company during the period of the lease should remain there—that was the agreement?

A. Yes, all tools and equipment and machinery—it was my understanding that way. (R. 59.)

Plaintiff urges that these findings were contrary to the undisputed evidence. In determining whether mining machinery is a fixture, the modern rule seems to be well stated in *Alberson vs. Elk Creek M. Co.*, 39 Or. 552, 65 Pac. 978, where it was held that three conditions control: annexation real or constructive; adaptability to the use of the realty; and the intention of the party making the annexation. In this case the machinery was placed as such machinery usually is for permanent use. The location of all of it, in view of the description of the premises, indicates that it was unlikely to be moved as long as the mine is operated. It is adaptable to the purposes of permanent mine operation. As to the intention, the testimony of Quitsch that it was intended to be placed permanently is corroborated by the lease itself, which provides that all machinery and equipment placed on the ground by the Free Gold Company shall remain. (R. 12-13.) As to the steel rails, plaintiff has been unable to find any prior case in which rails laid as a track on or under the ground were held to be personal property. Plaintiff further submits that while some of the articles enumerated in the findings are undoubtedly chattels they do not come under the description of "dredge, steam shovel, mill or machine," which are the only chattels upon which the Alaska lien law gives a lien. If a pipe line 400 feet long, in place and used for carrying water it not a part of the realty it is hardly a dredge, steam shovel, mill or machine. Beltings, pulleys, etc., were

attached to the machinery, which is claimed by plaintiff to have been part of the permanent improvements affixed by the land. Clearly their legal status would be the same as other machinery of which they were a part. The description of the property, taken in connection with the testimony showing the situation of the machinery upon the land, is easily understood by any person familiar with mines and mining machinery. The test of permanent improvements placed in the mine set forth in *Alberson vs. Elk Creek M. Co.*, *supra*, by the Oregon supreme court, is approved by the Washington Supreme Court in *Gasaway vs. Thomas*, 105 P. 168, wherein the same definitions and rulings were made as in the *Alberson* case. To the same effect is the opinion in *Mineral Creek M. Co. vs. Ramsey*, 4 Alaska 734, a case decided in 1913 in the Third Division of Alaska, from which this appeal is taken.

In the *Mineral Creek* case the opinion of the court discusses the law exhaustively, citing many late decisions on the subject of permanent improvements to mines. The court laid down the same rules as in the Oregon and Washington cases above cited. On the particular facts of that case the court held that the machinery was not permanently placed because the undisputed testimony showed that it was only intended for experimental purposes.

Strenuous efforts were made by counsel for the defendant in this case to convey the impression that the heavy machinery was not annexed to the land, for the reason that it might easily be removed, and incidentally to show by testimony that if it were removed no special

injury would result to the land or the buildings. It is not disputed that the buildings are flimsy and of no great value. As to the point that the machinery could be removed without injury to the land, it is hardly necessary to suggest to this Court that the building in which its sessions are held or any other building in the city of San Francisco can be removed without injury to the land. It is unnecessary to suggest further by way of argument that heavy machinery and frame buildings, although annexed to the land for permanent use, can nearly always be easily moved. The most important test in determining the character of improvements to land is the use for which they are intended and the intention of the parties in placing them where they stand.

The 20th assignment of error in its first paragraph raises the same contention as the 17th and 18th. The second paragraph of this assignment points out that the finding made by the court that all the machinery and equipment, with certain exceptions noted, belonged to the Free Gold Mining Company is misleading because it fails to recognize the reversionary right of plaintiff to all the property placed on the ground by the Free Gold Company, and that said finding is irrelevant to the issues. It seems superfluous to make more than passing reference to the fact already pointed out in this brief and admitted in the record, that the Free Gold Company by the terms of its lease was forbidden to move from the premises at any time, any improvement placed by it upon the land, or any chattel, even the smallest tool. This being true it is clear that a

creditor of the Free Gold Company could in no instance unless expressly authorized by law, sell any of the machinery or tools to be carried away from the premises. So long as the lease of the Free Gold Company continued a creditor could attach or sell upon execution the rights of the Free Gold Company under the lease, but under no circumstances could the reversionary interest be sold. That being the case the whole issue reverts back to the sufficiency of the notice of non-liability heretofore discussed.

The third paragraph of assignment 20 excepts to the finding that "upon none of such property described in the tenth finding was notice posted or any claim of ownership made or given by the plaintiff herein in direct terms or otherwise than as could be inferred from said lease," for the reason that the undisputed evidence shows that notices were posted in three conspicuous places on the ground, one of them at the entrance to the mill building containing most of the machinery and equipment described. This raises the issue of the sufficiency of the notice.

The 19th assignment of error raises the question of the ownership of the $12\frac{1}{2}$ per cent of the gold amalgam claimed by plaintiff as royalty under the terms of the lease. The plaintiff excepts to the finding on the ground that the recitals are not findings of fact but conclusions of law and are too indefinite to have legal effect either as findings of fact or conclusions of law.

By referring to the lease (R. 22) it will be noted that it called for a royalty of $12\frac{1}{2}$ per cent. The original lease (R. 18) provided that all gold taken

from the premises should be deposited by the lessees in the First Bank of Valdez, and by the bank forwarded to a United States assay office, and that upon receiving returns from each shipment the bank should credit the lessees and lessor respectively with the amount due each. This provision was unchanged in the supplementary lease. It appears to plaintiff as a legal conclusion that this agreement made the bank trustee for the parties, each separately, upon deposit of the gold in the bank, and that the lessees ceased to have any interest in or control over the 12½ per cent belonging to the lessor. It was contended by defendant in the trial court that the relation of debtor and creditor existed between lessee and lessor and that the lessee simply owes the amount of the 12½ per cent to the lessor. This might be true if the lease had provided that lessee should ship the gold product to the assay office and upon receiving the returns should pay the lessor its royalty, but under the provision of the lease plaintiff insists that defendant's position is wholly illogical and untenable.

Defendant contended that under Section 1 of the Alaska lien law all the product of the mining ground is liable for labor engaged in producing it, and a superficial reading of the particular provision referred to might lead to that conclusion, but upon reading other provisions of the law in connection with the one involved it seems a fair conclusion that the legislators intended the notice of non-liability to apply to royalties belonging to lessors as well as to the remainder of the property.

A further objection to this finding or conclusion, whichever it may be, lies in the fact that the construction contended for by defendant brings the Alaska lien law in direct conflict with the Congressional law governing public records affecting lands in Alaska. Section 379 of the Alaska Code of 1913 provides for public records to be kept by commissioners as ex-officio recorders. Section 499 *et seq* provides for filing of conveyances of lands or of any estate or interest therein. Section 561 provides that the term "lands" as used in Chapters 13, 14 and 15 of the same title shall be construed as coextensive in meaning with "lands, tenements and hereditaments" and the term "estate and interest in lands" shall be construed to embrace every interest, freehold and chattel, legal and equitable, present and future, vested and contingent in lands as above defined.

Reading all these provisions of the Alaska Code it will be seen that they provide that any interest in land is fully protected against all conflicting claims when the title documents describing the interest is on record in the proper recording office. This provision protects a record title against any form of conflicting invasion. If the Alaska lien law attempted, which plaintiff does not concede, to place lien rights above pre-existing record titles the provision is ultra vires and void.

It is true that labor lien laws are expressly designed to save the laborer his wages as far as possible and their beneficent purpose is admitted. However, no law protects a man against his own negligence, and it is plain that the law in providing for a notice of non-

liability by an owner of a leased mine intended to protect the owner and at the same time give notice to the laborer of the precise property upon which he might rely to secure his wages. There is no reason in natural justice why a miner who works for the lessee of a mine, with notice that his wages must come out of the interest of the lessee, should afterward be permitted to come into court and demand that the interest of the lessor be also subjected to his claim. That is the demand of the defendant in this case.

The 21st assignment of error excepts to the Court's conclusion of law that defendant's equities in the premises are superior to those of the plaintiff. The 22nd assignment excepts to the judgment. No argument can make these exceptions any clearer, and the plaintiff only calls attention to the fact that in this case, as set forth in plaintiff's complaint, and in the tenth finding of fact, (R. 107) plaintiff was not made a party to the suit foreclosing the miner's liens in question and therefore was not bound by the judgment. It was because of this fact that the trial court ordered the judgment in the former case reopened in order that plaintiff might defend its interest. It may be worthy of mention that the Alaska lien law expressly provides that no party having an interest in the property involved shall be bound by a judgment of foreclosure unless he is made a party to the suit, and in so doing only follows fundamental law.

The 16th assignment of error raises an issue totally aside from the general merits of the case. It is admitted that at the time defendant's foreclosure suit

was instituted, at the time his judgment was rendered and at the time the property in dispute purported to be sold by the marshal, plaintiff, a foreign corporation, had not complied with the laws governing foreign corporations "doing business" in the Territory of Alaska. It is also admitted that plaintiff did comply with the law on June 5, 1920, several months prior to bringing this suit. Defendant's contention is that plaintiff was barred from bringing suit and that all his contracts with Alaska citizens were void under the provisions of Section 660 of the Alaska Code of 1913.

Plaintiff asserts that this contention is wholly untenable for two reasons. First, the lease involved was made in Seattle, in the State of Washington, the domicile of the Plaintiff. If it be contended that ownership of property in Alaska by a foreign corporation constitutes "doing business," then no corporation created outside of Alaska can own property in the territory without filing its articles there. If this is true a foreign corporation could not lawfully acquire title to Alaska property by any form of purchase or by operation of law before it had complied with the laws of the territory regarding "doing business." Second, "doing business" has been held by the United States Supreme Court repeatedly to be the continuous act of conducting a general business, not the making of a single contract or doing any other single act. It is hardly necessary on this point to go further than to cite the Court to the well known case of the International Harvester

Company in 235 U. S., where the whole subject is exhaustively discussed with ample reference to preceding decisions. If defendant's contention is correct, a foreign corporation could not take over a single piece of property in payment of a just debt without performing all the acts necessary to qualify itself to transact a general business in the territory, nor could it by any lawful means become possessed of a rentable piece of property in the territory and make a lease of the same without qualifying to do a general business. It seems hardly necessary to remind this Court that the object of the laws which exist in every state requiring a foreign corporation to file its articles and otherwise comply with reasonable regulations before doing a general business, is to place foreign corporations on the same basis with citizens of the state, individual and corporate, and the reason of the requirement is that foreign corporations may not engage in a general business and make contracts upon which it may sue citizens of the state, and at the same time exempt itself from legal liability on the same contracts by keeping itself out of reach of the process of the courts of the state. This reason does not apply to a single transaction.

The first assignment alleges error in the denial by the trial court of plaintiff's motion to strike the affirmative defenses of defendant's answer. While this may not have been important, plaintiff contends that a brief inspection of them will show that they set up no allegations that could avail as a defense. Allowing them to

remain in the record may have been harmless error, but it may also have afforded excuse for the admission of incompetent testimony.

For all the reasons stated plaintiff respectfully submits that the judgment of the trial court should be reversed.

L. L. JAMES, Jr.

JOHN LYONS.

E. E. RITCHIE.

Attorneys for Appellant.

NO. 3641

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA HOMESTAKE MINING COMPANY,
a Corporation,
Appellant.

vs.

R. A. W. KRAMPITZ,
Appellee.

BRIEF OF APPELLEE

Upon Appeal From The District Court For The
Territory of Alaska, Third Division.

J. L. REED,
Attorney for Appellee.

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Upon Appeal From The District Court For The
Territory of Alaska, Third Division.

STATEMENT OF THE CASE

A statement of the case by appellee is made necessary as appellant has not served a brief within the time required by the rules.

The appellee, R. A. W. Krampitz, on the 19th day of March, 1920, commenced an action in the dis-

strict court against Free Gold Mining Company, a corporation, for himself and certain other lien claimants to foreclose their liens against the property now in controversy. The only part of the record in the lien foreclosure proceeding made a part of the record in the appeal of this cause is the Judgment and Decree (R. 95) entered April 17th, 1920. The property in controversy was sold to appellee at Marshal's sales May 1st and June 1st, 1920. Thereafter and not until the 19th day of October, 1920, did the Alaska Homestead Mining Company intervene or raise any question as to their ownership or interest in the property in question, at which time this equitable action was commenced. The trial court entered an order setting aside the judgment in the lien foreclosure suit, Cause No. 1029, for the purpose of determining the merits of the case raised by the issues in this Cause No. 1060. A hearing resulted in a judgment in favor of appellee and dismissing plaintiff's action, from which judgment plaintiff brings this appeal.

ARGUMENT AND AUTHORITIES.

As appellant and appellee were plaintiff and defendant in the trial court the latter terms will be adhered to in this brief.

Assignment No. 1. It is manifest that the Court

did not err in denying plaintiff's motion to strike defendant's affirmative defenses, the same being within the issues, the subject matter of the action and the rights of defendant in relation thereto.

Assignments 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14 and 15, relate to the admissibility of certain evidence introduced at the hearing and these assignments have been grouped because the underlying reasons governing the admissibility of this evidence are applicable to each and all.

The plaintiff's cause of action, its right to have the judgment in the lien foreclosure suit set aside, by reason of its alleged ownership and interest in the property involved is predicated upon the lease or leases, the posting of notices of non-liability for wages and the forfeiture provisions of the lease, all of which are set forth in the complaint. As the notices of non-liability for wages refer only to plaintiff's ownership or interest in the mining claims, Camp Bird No. 1 and 2, and no other notices having been posted, it is essential to plaintiff's case that the machinery be held to be real estate. Defendant demurred to plaintiff's complaint (R. 28) upon the ground "That it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action." Hence, before the question arises whether

the property is realty or personalty, the *right* of plaintiff to maintain this proceeding under the facts stated in its complaint *must first be established*. This goes back to the question, under the facts admitted, could plaintiff avoid miner's liens against any interest it might have in the property involved by posting of notices of non-liability for wages. The leases are set forth and made a part of the complaint, and it is alleged that they were assigned to Free Gold Mining Company, and that defendant's claims of lien were for wages or labor expressly stated to have been performed subsequent to the posting of the notice by plaintiff of non-liability for labor employed by the lessees or their assignee, (R. 5).

AGENCY.

Do the facts stated in the complaint create the relation of principal and agent between plaintiff and Free Gold Mining Company so as to preclude plaintiff from maintaining this proceeding? If the leases create agency, then the acts and declarations of the manager of Free Gold Mining Company were admissible in evidence against the Alaska Homestake Mining Company. The complaint affirmatively shows that the work of the lien claimants was done at the instance of the Alaska Homestake Mining Company within the intent of the law.

The miner's lien law of Alaska, entitled "An Act to Provide for Liens of Laborers and Miners etc.," approved April 21, 1915, provides in part:

Section 5. "All work and labor performed in, on or upon a mine or mining claim at the instance of any person in privity with, or having the right of possession, or privilege of working or mining thereon from the owner or his authorized agent, in prospecting * * * * * shall be deemed to have been done at the instance of the owner of the mine or mining claim, and such owners interests therein shall be subject to any lien filed in accordance with the provisions of this Act, unless such owner shall, within ten days after he shall have obtained knowledge of such work or labor being performed, give notice that he will not be responsible for the same, by posting notices in writing to that effect," etc.

In construing similar provisions of law in the case of,

Arctic Lumber Co. v. Borden 211 Fed. 54.

Gilbert, Circuit Judge said, "Assuming as found by the court below, that within three days from the commencement of the building Borden posted a notice in a conspicuous place thereon that he would not be responsible for any material or work furnished in the construction thereof, the question remains whether he thereby defeated the appellant's claim of lien," and further said "The provisions of section 265 are for the

benefit and protection of the owner in cases where work is not done and material is not furnished at his instance, *or at the instance of his agent*. It is not the intention of the law, nor is it the purport thereof, that when in fact the work is done, and the material is furnished at the owner's instance, he may prevent a lien upon his property by posting the notice referred to in that section."

And held, that where a lease authorizes the lessee to make improvements by deducting the cost from the rent, or where part of the consideration for the lease is the making of improvements which becomes a part of the realty or revert to the lessor, a mechanic's lien may attach for work done or materials furnished pursuant to a contract with the lessee. The Court approves the following rule and says, "It is a general rule that where a lease contains a provision authorizing the lessee to make improvements, by 'deducting the cost thereof from the rent, or where the consideration of the lease is the making by the lessee of improvements which become a part of the realty, or that the improvements made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done or materials furnished, pursuant to a contract with the lessee.' " 27 Cyc. 58 and cases cited.

In *Meyers v. J. A. Strowbridge Estate Co.* (Or) 160 Pac. 135.

The court said "By section 7416 L. O. L. the right to a lien upon a building is conditioned up-

on the labor or material for which a lien is claimed being furnished 'at the instance of the owner of the building * * * * or his agent.' Where it is provided in a lease as a part of the consideration thereof that the lessee shall make permanent improvements which shall revert to and become the property of the lessor at the termination of the lease, the lessor thereby *causes the improvement to be made* and the lessee becomes the *agent* of the lessor in the making of such improvements", and

Held, That under L. O. L. Sec. 7419, providing that every building constructed on land with the knowledge of the owner shall be held to have been constructed at his instance and shall be subject to liens, unless within three days after knowledge of such construction he posts a notice that he will not be responsible therefor, premises leased for a term and under which the lessee becomes the owner's agent and contractor for its improvement were subject to the liens of subcontractors, *notwithstanding the posting of such notice.*

The facts of this case are stronger, if anything, than those of the Arctic Lumber Company case in establishing agency between lessor and lessee and thereby creating a conclusive presumption of law against any claim or title or interest in the property by the lessor. The lien claimants were employed by Free Gold Mining Company who under the leases, were in privity with and having the right of poses-

sion and privilege of working and mining thereon from the owner, therefore, if agency was created a conclusive presumption arises that the work was done at the instance of the owner and he could not come into a court of equity with clean hands asserting ownership of the property involved.

The leases provide in part; (R. 17) "and after the 1st day of July, 1918, until the date of expiration of this lease the parties of the second part covenant and agree that they will keep at least six men steadily at work upon said mining claims * * * * that cessation of work * * * * for a period of thirty days shall work a forfeiture of this lease and the mining premises or mine described herein shall immediately revert to the party of the first part." and (R. 19) "agree to keep the said mine and all and every portion thereof, free and clear of and from all liens arising from labor performed." (R. 13) "It is further agreed and the parties of the second part hereby agree to have a compressor on said mining claims on or before the first day of July 1918, and that a mill capable of handling not less than ten tons of ore per day shall be placed on said mining claims on or before the 1st day of September, 1918.

(R.12) "It is further agreed that all improvements, machinery, tools and other equipment placed on said property by the parties of the second part during any of the time which this lease

has to run shall at the expiration of the term of the same be the property of the party of the first part and shall not be removed from said property," and also provides that all improvements, machinery, tools and other equipment placed on said property by the party of the second part, shall be the property of the party of the first part at the expiration of the lease or a forfeiture thereof.

Thus it will be noticed that under the terms of the leases that the lessor *required* the lessee to "keep at least six men steadily at work upon said mining claims," (R. 5) and under this *requirement* defendant Krampitz and the other lien claimants may be said to have performed labor. When they quit work and filed their liens plaintiff's right to declare a forfeiture arose therefrom.

Notice declaring a forfeiture was not given.

Q. There was no notice of forfeiture served upon you as manager of the company by Alaska Homestake Mining Company?

A. No. (R. 69).

The leases also *required* a compressor and a mill capable of handling not less than ten tons of ore per day to be placed on said mining claims by lessee.

OWNERSHIP

For the purposes of the miner's lien law of Alaska, agency once established between lessor and lessee, the Free Gold Mining Company became the owner of the property in dispute;

In *Webster City Steel R. Co. v. Chamberlain et al* 115 N. W. 504,

Bishop J. said "The statute gives a lien to every person who shall furnish any materials or machinery for any building, erection or other improvement upon land. An essential predicate for a lien is a contract with the owner or his agent, under which the materials or machinery are to be furnished *Code Sec. 3089*. An owner within the meaning of the statute is any person for whose use or benefit any building, erection, or other improvement is made *Code Sec. 3096*."

"We have then the question on plaintiff's appeal whether A. W. Chamberlain, a tenant in possession, who constructed an improvement for his own use and benefit—and this with full knowledge and approval of his landlord—comes within the statutory definition of an owner. If he does, then this lien should be allowed as against the improvement into which the materials purchased by him entered. If he does not—and there being no claim of contract with any other person—there must be a denial of the right to a lien. On this point, we think the case is ruled by *Estabrook v. Riley* 46 N. W. 1072, 10 L. R. A. 33."

And it was held that he was such an owner as the law contemplates for making contracts to be followed by mechanic's lien.

The judgment in the lien foreclosure suit Cause No. 1029 in part reads as follows:

“It is Ordered, Adjudged and Decreed as follows, to wit:

That by reason of the work and labor performed and done by plaintiff and his assignors upon, in and about said mills, machines and machinery and upon said dump or mass of mineral bearing earth, ore, rock and gold in the production thereof, hereinafter more particularly described, at the instance of the defendant, the owner and reputed owner thereof, the said plaintiff now has a first valid lien upon said mills, machines, etc” (R. 96).

The record shows that the plaintiff had both actual and constructive knowledge of defendant's lien foreclosure suit in which the judgment was entered April 17th, 1920, yet awaited until October 19, 1926 to bring this proceeding. Plaintiff's position now is the same as though it had intervened or had been made a party defendant in that suit.

In Pagnacco v. Faber et al 73 Atl. 172

It was held: It is incumbent upon a person owning premises, or having an interest therein

to assert his rights as such owner, or his equity arising out of such ownership, in a mechanic's lien foreclosure; and having failed to do so, he is concluded by the judgment for plaintiff.

In *S. H. Harmon Lumber Co. v. Brown* 131 Pac. 368.

It was held, that an owner of a lot was chargeable with constructive notice of the construction of lienable improvements made by a lessee where the lease *required* such improvements to be made, as was another lessor under a lease which did not require, but which contemplated the making of such improvements.

Waring et al v. Bass 80 So. 514.

It was held: The word privity as used in section 2210 *General Statutes of Florida* 1906, providing for the acquisition of liens by persons in privity with the owner, against the latter's real property, is not employed in the technical sense of the common law, but implies special knowledge showing active consent or concurrence (quoting Words and Phrases 1st Series—Privity).

Weiss & Jennett Min. Co. v. Rossi 198 S. W. 424.

The court said: "The principle is laid down that a lessor by binding his lessee to make improvements of substantial benefit upon the demised premises, thereby constitutes the lessee his *agent*, within the meaning of the Mechanic's Lien Law, and may thereby subject his property to a

lien for labor performed and materials furnished in making such improvements under a contract with the lessee. That obligation does not spring from the mere relation of landlord and tenant but from a contract express or implied between the lessor and lessee."

Harris et al v. Graham et al 111 S. W. 984.

It was held that, where a husband contracts for the improvement of his own wife's land with one believing the husband to be the owner, and the wife knowing such fact, permits the work to be done without disclosing her ownership, she will be estopped to set up her title in defense of an action to enforce a contractor's lien.

Ehrhardt Bros. D. Co. v. Columbia Candy Co.
186 S. W. 1113.

Held: Agency of the tenant to contract for improvements, authorizing a mechanic's lien need not be express, but may be implied from the owner's conduct and acquiescence and from circumstances estopping him to deny the agency.

PERSONAL PROPERTY

Assignments 7, 17, 18, 19, 20 and 21 relate, to a ruling of the Court and to the findings of fact that the machinery and gold bullion to be personal property within the meaning and intent of the Miner's Lien Law of Alaska, 1915. This law does not enlarge either class of property. It leaves the decisions of the courts as to what constitutes realty and personalty and the tests to be applied, the same after, as before its adoption.

Section 13 Session Laws of Alaska 1915, p. 28 provides

“And the term “mill” or “machine” shall be construed to include any hoist, engine, and boiler, roasting or reduction works, stamp, roller or other mill, concentrator, conveyor, elevator, or other machinery used in and about a mine in digging, hoisting, conveying, washing, or blocking out mineral contents thereof, or reducing same to commercial value, while the said mill or machinery is at the mine or on the mining claim and used in connection with the operation thereof and which are not fixtures and included in the term “mine” as hereinabove defined.”

Section 5 p. 33 requires notices of non-liability to be posted “on such dredge, steam shovel, mill or machine,” whereas the latter part of said section page 34, reads “All labor performed in any

manner directly aiding or assisting in the production of dump or mass of gold bearing sands, gravels, earth, ore or rock, shall be deemed to have been performed at the instance of the owner thereof, and the same shall be prior and preferred over any deed, mortgage, bill of sale, attachment of other claim whether made or given prior to such labor or not."

It was the evident intent of the law, that where the lessee employs labor "in the production of a dump or mass of gold bearing sands," etc. that the labor should have a 100 per cent lien rather than and 87 1-2 per cent lien as claimed in behalf of plaintiff, and this, without any means being suggested of escaping liability.

Many of the items covered by the lien (R. 7. & 8.) are described in the exact language of the law as being within the definition of "mill" or "machine" to wit; mills, engine, concentrator, *hoist* engine and *gas* engine.

Henkle et al v. Davis et al 15 Or. 610.

The court said "To give a chattel the character of a fixture, and to render it immovable, three things are necessary '(1) Actual annexation to the realty or some appurtenant thereto (2) application to the purpose or use to which that part of the realty with which it is connected is appropriated; and (3) the intention of the parties

making the annexation to make a permanent accession to the freehold.”

In the case now before the Court there was an appreciable but not actual annexation of the machinery to the freehold. Wm. Quitch, the manager of Free Gold Mining Company believed that the machinery, of which five-sixth had been purchased by Free Gold Mining Company was personalty and subject to labor liens. He conveyed his impressions to the men who worked on the ground, they relied upon his assertions of ownership and lienability of the machinery. He states that it was impossible to get men to work without this protection. (R. 60) The annexation of the machinery to the realty was so slight and incomplete that all the men who saw conditions as they existed were misled inclusive of the manager of the Free Gold Mining Company, if the finding of fact by the lower court that it was personalty, was an error. It was second hand machinery, (R. 62) ; it had been mostly brought from another mine near by ; it could be removed without impairing the buildings, without damaging the realty and without injury to the machinery by removing the bolts and nuts, while in some instances even this was unnecessary.

In re Seward Dredging Company 242 Fed. 225.

The court said "We hold as a fact that the combustion engine, and a fortiori the other articles, were easily removable by (at the most) loosening certain bolts, and that such removal would neither have injured nor destroyed the realty nor destroyed nor necessarily injured the chattels. This being the case the Oregon decisions do not impose upon them the character of a realty. *Herchberger v. Johnson* 37 Or at 111. This holding is consistent with the only local decision on the subject *Mineral etc. Co. v. Ramsay* 4 Alaska 734. It is perhaps true that the trend of opinion in the Oregon decision is more strongly against the removal or severability of chattels than is warranted by *Holt v. Henley* 232 U. S. 637 and *Detroit etc. C. v. Sisterville* 233 U. S. 712 but they go far enough for this case."

Albertson v. Elk Creek Mining Co. 39 Or. 552.

There is practically no dispute as to the facts of this case. Wm. Quitch, president and manger of Free Gold Mining Company and also a stockholder in the Alaska Homestake Mining Company testified (R.60)

Q. Did you try to get Mr. Holland to go to work without claiming a lien on the ground or upon the machinery? Did you have a paper drawn up so if he signed it he would go to work without claiming any lien rights on the property?

A. No.

Q. You did not?

A. No. I did have a paper drawn up by Mr. Dimond when I first got to be manager of the company. I presented it to Herman Hill, possibly, somebody else and everybody that seen it would simply turn away and say, "I don't need work that bad," so I wouldn't present it to anybody else.

And further testifying (R. 62)

Q. And all the rest of it was bought and paid for by the Free Gold Mining Company and put on the ground?

A. Except the forge.

Q. The Court: What was the proportion of the property that was put on, would it be a quarter or what—the property that was put on there?

A. One-sixth would be more nearly it.

Q. Partly omitted—was that second-handed machinery, or was it new machinery.

A. It was for the most part second-handed machinery.

Q. As to the character of the buildings down there, aren't they all single-board buildings, temporary structures, with corrugated iron roofs—single-board buildings?

A. Yes, sir.

Q. All of this machinery, the heavy machin-

ery, to disconnect it from anything that it was attached to, all it would require would be to take out a bolt or nut?

A. Yes. (R. 62).

And further testifying, (R.63).

Q. Now, in regard to taking that machinery out—could that machinery be taken apart and removed without injury to the buildings?

A. Yes, sir.

And further testifying as to his belief in the ownership and lienability of the machinery, (R. 65 & 66).

Q. I will ask you this question—shortly prior to January 8th, in the compressor building, in your presence and in the presence of Nick Meckem and William Holland, did you hear Holland ask whether in view of the notices that were posted their claims would be collectable, and you said, to these two men, well, the machinery is good for the labor, isn't it?

Objections.

Q. Did you make the statement?

A. I wouldn't say, but the chances are I did, because that was my belief at that time.

And further testifying, (R. 65).

Q. And you conveyed that belief to practical-

ly all of these men that were down there, at various times?

* * * * *

A. I don't know; I didn't make any special speech, I don't suppose, but I do believe that everybody thought that, understood it that way.

Q. The Court: That was your opinion?

A. That was my opinion.

Q. And you stated that opinion to the men that were down there working, did you not?

A. I believe I did, all right.

DOING BUSINESS

Assignment No. 16, relates to the finding of the Court as a fact that plaintiff was "doing business within the Territory of Alaska." Defendant's first affirmative defense alleges (R. 32) that plaintiff was a foreign corporation and that prior to the 4th day of June, 1920, had wholly failed to comply with the provisions of Chapter 23 of the Compiled Laws of Alaska, 1913, relating to foreign corporations, inasmuch, as it had failed to file copies of its articles of incorporation, certificate of its consent to be sued in the courts of the district, and the appointment of a resident agent upon whom service of process might be made.

Plaintiff replying alleges, (R. 40).

“Replying to the first affirmative defense set forth in defendant’s answer plaintiff denies that at any time mentioned in its complaint it was engaged in doing a general business in the Territory of Alaska.”

The pleadings impliedly admit that plaintiff was doing other than a “general business.”

Compiled Laws of Alaska, Sec. 660, provides, “If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the District shall be void as to the corporation or company, and no Court of the District, or of the United States, shall enforce the same in favor of the corporation or company so failing.”

Prior to October 20th, 1917, the date of the first lease between plaintiff and J. E. Whalen and Wm. Quitch, the testimony of the latter show the following activities of plaintiff, (R. 50 & 51).

Q. Were you one of the locators of these claims?

A. No.

Q. Your first interest in them was when you and Whalen took the lease from the Alaska Homestake Mining Co?

A. No. it was some time before that—I was sent down to sink a shaft. I sunk a shaft before that.

Q. You did some work for the Alaska Homestake Mining Co?

A. Yes, under the direction of Mr. Topliff.

Q. When did you go down there to work for the Alaska Homestake Mining Co.?

A. About a year before,—I don't know the date.

The lease itself shows that the mining ground at the date thereof was in a partial state of development and contains this description, in part, of the leased premises; “together with all improvements, machinery, tools, buildings and equipment upon or near said mining claims.” (R. 16).

The lessee was *required* under the terms of the lease to “keep at least six men steadily at work upon said mining claims,” (R. 17) and under this and other provisions of the leases the plaintiff continued to do business within the Territory of Alaska.

Assignment No. 22, that the Court erred in entering judgment against the plaintiff and in favor of the defendant, being too general, does not conform with Rule 11 of this Court requiring plaintiff to set out

particularly the error asserted and intended to be urged.

Counsel for appellee respectfully submits that the record discloses no reversible error and that the judgment of the district court of Alaska should be affirmed.

J. L. REED,
Attorney for Appellee.

